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No. 84-768

IN THE

Supreme Court of the United States

October Term, 1984

ALLSTATE INS. COMPANY, ARGONAUT INS. COMPANY, HARLEYSVILLE INS. COMPANY, OHIO CASUALTY GROUP OF INS. COMPANIES, ROYAL INS. COMPANY, SUN COMPANY, INC., TRAVELERS INS. COMPANY and WAUSAU INS. COMPANIES,

Appellants/Objecting Members of Defendant Class,

vs.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, CHARLES SAMUEL, Individually and on behalf of all others similarly situated,

Appellees/Plaintiffs,

and

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS ASSOC. INS. COMPANY, AMERICAN MUTUAL LIABILITY INS. COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORP. and all other insurance carriers and/or self-insured employers similarly situated,

Defendants (Appellees).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT

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Questions Presented

I. WHERE INTERIM SUSPENSION OF WORKMEN'S COMPENSATION BENEFITS, PENDING FINAL EVIDENTIARY DETERMINATION OF A PETITION FOR TERMINATION, CAN BE EFFECTED ONLY ON THE BASIS OF A PHYSICIAN'S AFFIDAVIT OF FULL RECOVERY FROM THE INJURY, OR A RETURN TO WORK WITH NO LOST EARNINGS, IS THERE NOT ABSENCE OF ANY DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW, NECESSARY TO CONSTITUTE VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II. WHERE INTERIM SUSPENSION OF WORKMEN'S COMPENSATION BENEFITS, PENDING FINAL EVIDENTIARY DETERMINATION OF A PETITION FOR TERMINATION, IS EFFECTED BY PRIVATE PERSONS, OR OTHERS ACTING IN SIMILAR CAPACITY, AND OFFICIALS OF THE STATE ONLY ADMINISTRATIVELY PROCESS THE PETITION FOR ASSIGNMENT TO A HEARING REFEREE, IS THERE NOT ABSENCE OF STATE ACTION NECESSARY TO CONSTITUTE VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

List of Parties

Plaintiffs:

Richard Baksalary, William Jones, Morris Tucker and Charles Samuel, individually and on behalf of all others similarly situated

Defendants:

Paul J. Smith (Secretary, Pa. Dept. Labor & Industry); C. John Urling, Jr., (Director, Pa. Workmen's Compensation Bureau); Grace M. Sloan (Treasurer, Commonwealth of Pa.); William J. Sheppard (Pa. Insurance Commissioner)

State Workmen's Insurance Fund, Pennsylvania Manufacturers Association Ins. Company, American Mutual Liability Ins. Company, The School District of Philadelphia, Bituminous Casualty Corp. and all other insurance carriers and/or self-insured employers similarly situated

Intervenor:

Liberty Mutual Insurance Company

Appellants: (Objecting Members of Defendant Class)

Allstate Ins. Company, Argonaut Ins. Company, Harleysville Ins. Company, Ohio Casualty Group of Ins. Companies, Royal Insurance Company, Sun Company, Inc., Travelers Ins. Company and Wausau Ins. Companies

Designation of corporate relationships
Appendix to Jurisdictional Statement 150a

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Opinions Below

The opinion of the three judge court on the merits is reported at 579 F. Supp. 218 (E.D. Pa. 1984), and is printed in the Appendix, pages 36a-83a. The subsequent final order and opinion of July 30, 1984, and the order of August 15, 1984, amending the July 30, 1984 order, are printed in the Appendix, pages 1a-35a.

Jurisdiction

This is a dual class action under Fed. R. Civ. Pro. 23(b)(2), heard by a three judge court convened pursuant to 28 U.S.C. §2281 (now repealed) and §2284, challenging the constitutionality of a supersedeas provision in the termination procedure of the Pennsylvania Workmen's Compensation Act and alleging deprivation of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, said to entitle plaintiffs to injunctive and declaratory relief under the Civil Rights Act of 1871, 42 U.S.C. §1983 (Supp. V. 1981).

Following a determination of the constitutional merits, the final order of the three judge court approving a consent decree, drawn by the named parties, granting injunctive and declaratory relief, was entered July 31, 1984 (as amended August 13, 1984). The instant appellants, as objecting members of the defendant class, after filing a "protective" appeal to the United States Court of Appeals for the Third Circuit on August 29, 1984, then filed a notice of direct appeal to the United States Supreme Court on September 20, 1984, in the United States District Court for the Eastern District of Pennsylvania.

Direct appeal to this Court, from the three judge court order, is taken pursuant to 28 U.S.C. §1253; and see *White v. Regester*, 412 U.S. 755, 760 (1973), where, upon direct appeal under that section from entry of an injunction, this Court held that appellants were also "entitled to review of the District Court's accompanying declaration."

In response to appellant's petition for a stay of proceedings pending before the circuit court, appellees proposed that appeal by the instant appellants be limited

to a question of the propriety of the district court's approval of the consent decree, excluding any consideration of the constitutional issue on the merits, thereby precluding direct appeal to this Court. To support such a contention, appellees have cited *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928), alluding to language to the effect that a decree rendered by consent "is always affirmed, without considering the merits of the cause." The situation in *Swift*, and thus the context in which the phrase was uttered as a general proposition, however, was that of *consenting* class members seeking to vacate a decree they themselves had previously agreed to, by a *collateral motion* instead of appeal, four years after they had stipulated to the entry of that decree. This is hardly comparable to the situation here, where *objecting* class members filed an immediate, *direct appeal*, upon entry of the final order.

Indeed, the *Swift* Court noted that "[d]ecrees entered by consent have been reviewed upon appeal . . . where there was a claim of lack of actual consent . . . ." *Id.* at 324. In any event, this Court did in fact consider and respond to each of the eight reasons that were relied upon there as jurisdictional bases to vacate the previously agreed decree. *Id.* at 276 ff. *Swift* thus actually affords support if not direct authority for appeals such as this one on the constitutional merits, which go to the district court's jurisdiction in the first instance.

Nor does this Court's decision in *Heckler v. Edwards*, ___ U.S. ___, 104 S.Ct. 1532 (1984), also relied upon by appellees in the circuit court proceedings, suggest otherwise. In *Heckler*, unconstitutionality of a federal statute was *not* actually in issue, the question having been rendered moot by acquiescence at pretrial. Since the

petitioner there did not defend the constitutional issue, or contest the district court's holding of unconstitutionality, and appealed instead only the "remedy," this Court held that direct appeal (there under 28 U.S.C. §1252) would not lie, and that an appeal was properly taken to the circuit court and should not have been dismissed.

Here, however, the situation is exactly opposite; these appellants, as objecting members of defendant class, specifically preserved their right to question the entire constitutional determination by the lower court, while appearing and objecting at the time of the fairness hearing on the proposed consent decree, which was framed solely by the named parties to implement that constitutional determination. And in fact, appellants have appealed that core constitutional issue.

This then is not an effort at belated or collateral reconsideration of a settlement. Rather, in a case founded upon plaintiff class members' complaint of alleged absence of prior notice and opportunity to be heard, this is an immediate appeal by previously absent defendant class members who entered appearance and objected upon first notification of these proceedings. As yet, they have had no opportunity to be heard on the merits of the constitutional determination which directly and dramatically affects each one of them adversely by a final order providing for individual injunctive prohibition, as well as liability for an apportioned share of plaintiffs' attorney's fee. As such, this direct appeal from a final order of a three judge court granting injunctive relief is necessarily warranted, if not to say required, under the applicable provisions of 28 U.S.C. §1253.

Constitutional and Statutory Provisions

I. U. S. CONSTITUTIONAL PROVISION

Amendment XIV, §1, which states in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

II. STATUTORY PROVISIONS

a) United States Code

1) Direct appeals from decisions of three-judge courts
28 U.S.C. §1253

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

2) Injunction against enforcement of State statute; three-judge court required
28 U.S.C. §2281

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

3) Civil Rights Act of 1871
42 U.S.C. §1983 (Supp. V. 1981)

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

b) Federal Rules

Class actions

Rule 23, which states in relevant part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of sub-division (a) are satisfied, and in addition: . . .

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ."

c) State Statute

Pennsylvania Workmen's Compensation Act

1) *Prior* §413 Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1952), which stated in relevant part:

"The filing of a petition to terminate or modify a compensation agreement or award as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require."

2) *Present* §413(a), Pa. Stat. Ann. tit. 77 §774 (Purdon Supp. 1984) provides in relevant part:

"The filing of a petition to terminate or modify a notice of compensation payable or a compensation agreement or award as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require only when such petition alleges that the employee has returned to work at his prior or increased earnings or where the petition alleges that the employee has fully recovered and is accompanied by an affidavit of a physician on a form prescribed by the department to that effect which is based upon an examination made within fifteen days of the filing of the petition."

Statement of the Case

A. Procedural History

Plaintiff-employees brought this action in 1976 against their respective employers and/or workmen's compensation insurance carriers, naming in addition certain officials of the Commonwealth of Pennsylvania (Secretary of Labor & Industry, Treasurer, Insurance Commissioner and Director of Workmen's Compensation Bureau), seeking injunctive and declaratory relief from a supersedeas procedure in Section 413(a) of the Pennsylvania Workmen's Compensation Act. It was contended that this procedure for interim suspension of workmen's compensation benefits, while awaiting a formal evidentiary decision on a petition for termination, constitutes a violation of the due process clause of the Fourteenth Amendment to the United States Constitution, entitling plaintiffs to relief under §1983 of the Civil Rights Act of 1871.

Upon motion by plaintiffs, a three judge court was convened pursuant to 28 U.S.C. §2281 (since repealed) and §2284. Subsequently, again on motion by plaintiffs, an order was entered permitting the case to proceed as a dual class action under Fed. R. Civ. Pro. 23(b)(2); the plaintiff class being all employees who have had, or will have, their workmen's compensation benefits suspended under the supersedeas procedure, and the defendant class being all employers and insurance carriers who have suspended, or will seek to suspend, workmen's compensation benefits under that procedure.

After eight years in litigation, the three judge court filed its opinion on the merits on February 1, 1984, concluding that (Apdx., 72a):

> plaintiffs have made out a violation of 42 U.S.C. §1983 (Supp. V 1981). Plaintiffs are entitled to entry of a judgment declaring the unconstitutionality of the automatic supersedeas provision of section 413.

Baksalary v. Smith, 579 F. Supp. 218, 233 (E.D. Pa. 1984). While the court awaited suggested forms of order from the named parties, for remedial implementation of their decision on the merits, those named parties entered into a proposed consent decree (Apdx., 110a) which, after preliminary approval by the three judge court (Apdx., 131a) was scheduled for a fairness hearing on June 18, 1984.

Upon receiving notice of the proposed consent decree and fairness hearing, certain previously unnamed members of defendant class who had no prior notification of the proceedings, including appellants herein, through counsel, appeared of record, filed objections with regard to issues raised for consideration at the fairness hearing, and specifically preserved their rights to object to the entire constitutional determination (Apdx., 135a, 137a, 144a, 146a).

Following the fairness hearing and presentation of objections and argument at that time, the three judge court entered a final order under date of July 31, 1984 (Apdx., 30a), as amended by the order of August 13, 1984 (Apdx., 34a). The court thereby approved the consent decree and granted injunctive and declaratory relief, proscribing the use of the supersedeas procedure in §413(a) of the Pennsylvania Workmen's Compensation Act.

Appellants initially filed an appeal to the United States Court of Appeals for the Third Circuit on August 29, 1984 (Apdx., 84a) to protect their position should any eventual decision require initial appellate determination by the circuit court. That appeal remains pending; however, a motion for a stay of proceedings to await this Court's determination has now been granted (Apdx., 148a).

B. Factual Background

The Pennsylvania Workmen's Compensation Act provides a schedule of compensation for injuries received by an employee in the course of employment and a procedure for the determination of liability and compensation. Pa. Stat. Ann. tit. 77, §§1-1031 (Purdon Supp. 1984). The arrangement is one between employer and employee whereby, in return for immunity from suit at common law based on "fault," the employer bears the cost, ultimately passed on to the consumer, of work-connected injuries regardless of fault. The required system of insurance assures payment and avoids having the cost of such injuries borne by public funds. *See Silas v. Smith*, 361 F. Supp. 1187, 1188 (E.D. Pa. 1973).

Liability is either accepted under a form of notice of compensation payable or agreement, §407; Pa. Stat. Ann. tit. 77, §731 (Purdon Supp. 1984), or determined by a workmen's compensation referee following a petition filed by the employee with the Workmen's Compensation Bureau. §410; Pa. Stat. Ann. tit. 77, §751 (Purdon Supp. 1984).

Upon agreement or award, the employer and/or his workmen's compensation insurance carrier remains responsible for continued payment of workmen's compensation benefits, unless and until there is some subsequent agreement or award suspending or terminating that obligation. §413(b); Pa. Stat. Ann. tit. 77, §774.1 (Purdon Supp. 1984). Where the parties fail to agree upon the cessation of payment, the Act provides a procedure to effect termination, suspension or modification of any existing agreement or award. Under this procedure, a petition is filed by or on behalf of the

employer with the Workmen's Compensation Bureau, assigned to a referee, and formal hearings ensue until a final evidentiary determination is made as between the contesting parties, employer and employee.

In those proceedings under a petition for termination of compensation payments the burden is strictly and solely upon the employer. *See Page v. W.C.A.B.*, _____ Pa. Commw. _____, 476 A.2d 508, 509 (1984). If the employee ultimately prevails in the pending evidentiary hearings on the petition for termination, following an interim suspension of payment, he is then awarded full retroactive relief, with ten per cent interest. *See Baksalary v. Smith*, 579 F. Supp. 218, 224, 225 (E.D. Pa. 1984). And unless the employer establishes that there was reasonable basis for the petition, the employee is also awarded payment of his attorney's fee. §440; Pa. Stat. Ann. tit. 77, §996 (Purdon Supp. 1984). In addition, the employer may be responsible for payment of penalties to the employee for any violation of statutory requirement or rule. §435; Pa. Stat. Ann. tit. 77, §991 (Purdon Supp. 1984).

In relevant part, *prior* section 413 of the Pennsylvania Workmen's Compensation Act, setting forth the procedure for such petitions to change or terminate benefits, provided:

> The filing of a petition to terminate or modify a compensation agreement or award as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require.

§413; Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1952). Effective May 1, 1972, §413 was amended to *present wording*:

> The filing of a petition to terminate or modify a notice of compensation payable or a compensation agreement or award as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require *only when such petition alleges that the employee has returned to work at his prior or increased earnings or where the petition alleges that the employee has fully recovered and is accompanied by an affidavit of a physician on a form prescribed by the department to that effect which is based upon an examination made within fifteen days of the filing of the petition.*

§413(a); Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1984) (emphasis supplied). The italicized portion of §413(a), added by amendment in 1972, is the subject of the instant litigation. Plaintiffs complain that the supersedeas procedure allowing for an interim suspension of workmen's compensation benefits, though now permitted *only* on the two described bases, while awaiting final evidentiary determination of a formal petition for termination, nevertheless constitutes a violation of the due process clause of the Fourteenth Amendment to the United States Constitution, entitling them to injunctive and declaratory relief under §1983 of the Civil Rights Act of 1871.

Substantiality of Issues

A. Due Process

Appellees-plaintiffs contend that interim suspension of workmen's compensation benefits under §413(a) of the Pennsylvania Workmen's Compensation Act, based either on physician's affidavit of full recovery from injury, or return to work with no lost earnings, while awaiting final evidentiary determination of a pending petition for termination, constitutes a violation of the due process clause of the Fourteenth Amendment to the United States Constitution; and that this entitles them to relief under §1983 of the Civil Rights Act of 1871, by reason of the absence of prior notice and opportunity to be heard.

Initially the question arises whether workmen's compensation benefits are constitutionally protected property; if they are not, then of course there can be no constitutional violation with regard to even an actual "taking." *Board of Regents v. Roth*, 408 U.S. 564 (1972). Unlike the public funds from federal grants in aid, as in *Goldberg v. Kelly*, 397 U.S. 254, 256 n.1 (1970), or revenue derived from employee and employer payroll taxes, as in *Matthews v. Eldridge*, 424 U.S. 319, 323 n. 1 (1976), workmen's compensation benefits are insured payments which the employer is alone responsible for supplying, either through a self-insurance or private insurance program.

In dealing with workmen's compensation benefits, this Court has long recognized that broad latitude is to be given "state economic and social regulation." *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). Nor does Pennsylvania consider entitlement to

workmen's compensation disability benefits "a fundamental right." *See Guess v. W.C.A.B.*, 77 Pa. Commw. 319, 324, 466 A.2d 1098, 1101 (1983).

If there is a protected property right, it surely does not rise to the level of protection that would be applicable either to life-threatening or welfare-requiring situations. Indeed, the issue is always one of "balancing"; "due process is flexible and calls for such procedural protections as a particular situation demands." *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In speaking of the Federal Longshoremen's & Harbor Workers' Compensation Act, and other similar workers' compensation statutes, Justice Marshall recently stated in *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. _____, _____, 104 S.Ct. _____, _____, 81 L.Ed. 2d 768, 775 (1984):

> These statutes reflect a legislated compromise between the interests of employees and the concerns of employers. On both sides, there is a *quid pro quo.* In return for the guarantee of compensation, the employees surrender common-law remedies against their employers for work-related injuries. For the employer, the reward for securing compensation is immunity from employee tort suits.

As was said by this Court in *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. _____, _____, 103 S.Ct. 2045, 2052 (1983), a compensation act is "not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the [employees] on the one hand, and their employers on the other". And while the Pennsylvania Supreme Court has consistently interpreted the Workmen's Compensation Act liberally in favor of employees, they have at the same time

emphasized that "... there is always grave danger of overlooking the fact that the compensation act is what it purports to be—an act to compensate for ... injuries and not one to insure the life and health of the employee." *See Monahan v. Seeds & Durham*, 336 Pa. 67, 74, 6 A.2d 889, 892 (1939).

These basic principles must be kept in mind then when seeking resolution of the issue whether the administrative procedures provided under the Pennsylvania Workmen's Compensation Act are constitutionally sufficient. What is required is an analysis of the interests. *See Matthews v. Eldridge*, 424 U.S. 319, 334 (1976). In making such analysis, it is important to recognize that unlike the welfare recipient in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the workmen's compensation claimant does not receive payment on the basis of "need"; moreover, as the social security disability claimant, in *Matthews v. Eldridge*, 424 U.S. 319 (1976) has alternative sources of financial aid, so too, the workmen's compensation recipient has these, and in addition also has available the very social security disability benefits which were the subject of *Matthews*.

The risk of erroneous deprivation of workmen's compensation benefits is at least subject to a degree of balancing by the risk of erroneous payment by the employer or workmen's compensation insurance carrier. The qualitative balancing must necessarily take into account the importance, if not to say the necessity, of a fair system that not only affords benefits to employees, but also protects against erroneous and unwarranted payment that would otherwise adversely affect both the local economic structure, by driving business in search of more favorable climates, and the very moral structure of the community.

Nor is there here any "governmental interest" peculiar to those other cases where the government is the creator, holder and administrator of the fund; and where, when a question arises as to recipients' entitlement, it is then the government itself that is both the adversary and the arbiter in the proceeding. Such is not the case in connection with workmen's compensation benefits, where the "governmental interest" of the Commonwealth extends essentially to ministerial review and orderly administration of the procedure whereby private parties, employees and employers, effect a system of payments for disability as the result of injury in the course of employment, without regard to fault, in lieu of the prior common law system.

In all, and throughout, the lower court appeared to rely heavily on *Matthews v. Eldridge*, 424 U.S. 319 (1976). What must be kept in mind though is that *only* in *Goldberg v. Kelly*, 397 U.S. 254 (1970), where it was emphasized that those welfare recipients were on the very margin of subsistence, has this Court held that due process requires an evidentiary hearing prior to a temporary deprivation. What is actually held in *Matthews* is that there was "less reason [there] than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 343.

With the instant case then requiring less "process" than *Matthews*, the question posed is whether, aside from the procedures in place, which themselves afford "process," there is some need for, or requirement of, additional process; in short, is additional process "due"?

1) Physician's Affidavit

Where supersedeas is effected on the basis of a physician's affidavit, the employee has had some, if not to say a considerable, degree of "process." Thus he is notified to appear for an examination by a licensed medical practitioner. At the time of examination, he has opportunity to voice and explain complaints, and certainly recognizes from the outset that since Pennsylvania is a "wage loss" state, and he has been receiving workmen's compensation benefits on the basis of disability from a work connected injury that prevented him from returning to work, the examination of necessity is designed to determine medical status, and in particular ability to resume gainful employment.

Before the supersedeas procedure can be utilized, the physician, following examination, must attest in a notarized statement that the claimant has *fully recovered* from injury and is *able to resume pre-injury job duties without limitation.* This, it should be noted, is a much stricter test and requirement than that which would ultimately entitle an employer to termination of compensation benefits in the course of formal hearings that are already in process, where the referee need only find "that the claimant's disability has ceased" so as to permit a return to work. *See Paxson v. W.C.A.B.*, _____ Pa. Commw. _____, _____, 474 A.2d 1233, 1235 (1984).

The physician's affidavit must then be attached to a formal petition for termination and filed with the Workmen's Compensation Bureau by or on behalf of the employer, for purposes of assignment to a Referee, who will then proceed to hold formal hearings directed to a final determination. Such filing is required to be accomplished within just fifteen days after the doctor's

examination, to assure that any interim suspension of payments based on the affidavit is reflective of a current medical evaluation.

Thus in every case the employee is entitled to and necessarily receives—*automatically*—a full evidentiary hearing prior to a final determination by an impartial referee, before whom the employer has the burden of proving entitlement to any stoppage of payment. In the meantime, §422 of the Pennsylvania Workmen's Compensation Act gives the employee access to "complete record of the medical and surgical services and hospital treatment including X rays, laboratory tests, and all other medical and surgical data in the possession or under the control of the [employer]." Pa. Stat. Ann. tit. 77, §835 (Purdon Supp. 1984). The relevant distinction to be kept in mind then, when considering the supersedeas procedure, is that in those cases where prior "notice" was deemed essential, the recipient who was being deprived of benefits, though he generally had some "right" to *seek* formal hearing by request, did *not automatically* receive formal evidentiary determination after the preliminary decision was made to stop payment. *See Matthews v. Eldridge*, 424 U.S. 319, 324 (1976). In a such situation, it may be argued that prior "notice" gives a recipient a more effective opportunity to have "some kind of hearing" *where he might otherwise have none at all*! But under the Pennsylvania Workmen's Compensation Act, the case *automatically* proceeds by way of formal petition to a final evidentiary determination, with the burden of proof on the employer, and there is no similar need for some abstract prior "notice" that does not serve any significantly useful purpose in and of itself.

Presumably the requirement of prior notice, where it exists, is to advise the benefit recipient at a meaningful time of an interruption of benefits so that he may take such counter-action as he may wish in a meaningful manner. These elements must, however, be considered in context. Where, as in both *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Matthews v. Eldridge*, 424 U.S. 319 (1976), the interruption of payment was by the governmental holders of public funds, themselves chargeable with the final determination of continued entitlement, prior notice may be necessary. Indeed, absence of notice in such situation may actually effectively preclude a recipient from even an *eventual* opportunity for full evidentiary hearing. When this is compared with the Pennsylvania procedure, where the employer-party to the insured program may suspend benefits *only* on one of two restricted bases, while at the same time necessarily initiating an automatic formal petition for termination, which is then processed to a final evidentiary determination, and where that final determination is made not by the party who suspended benefits, but rather by an impartial administrative agency of the Commonwealth, the balance of interests and equities is apparent, and no actual deprivation of property without due process of law exists.

In the context then of the adversary system in effect under the Pennsylvania Workmen's Compensation Act, the employee does indeed have an opportunity to be heard at a meaningful time in a meaningful manner, in the course of a formal "automatic" evidentiary procedure on the petition for termination, under which the interim suspension of compensation benefits was effected, and where the burden of proof is entirely on the employer. *See Page v. W.C.A.B.*, _____ Pa. Commw. _____, 476 A.2d 508, 509 (1984).

2) Return to work with no lost earnings

So emphatically did the district court stress generic requirement of "notice" and "opportunity to make presentation" that they applied, or at least sought to apply, that reasoning to the alternative supersedeas situation where workmen's compensation benefits are suspended, while awaiting final determination on a formal petition for termination, on the basis of an employee having returned to work with no lost earnings.

It is even more apparent than in the physician's affidavit situation that arguments with regard to deprivation of property without due process of law simply do not apply to the "return to work situation." Nothing in *Matthews v. Eldridge*, 424 U.S. 319 (1976), suggests to the contrary, and significantly, in the very case relied upon by the district court, *Auxier v. Woodward State Hospital-School*, 266 N.W.2d 139, 142-143 (Iowa 1978), *cert. denied* 439 U.S. 930 (1979), *the Supreme Court of Iowa specifically excepted from its denial of due process determination those cases, "where the claimant has demonstrated recovery by return to work."* (Emphasis supplied.) In fact, it should also be noted that though the Iowa court did find a due process deprivation in a "disability situation," where there was a discontinuance of further payment without notice and opportunity to submit evidence of documents, there, as in *Matthews*, the summary termination of payment was *not* accompanied by any concurrent "automatic" procedure for final evidentiary determination. In *Auxier*, the employer simply stopped payment because some "report does not indicate that your client has very much permanent partial disability." *Id.* at 140. Such a doctrinaire determination can hardly be considered comparable to the strict interim suspension procedure under the

Pennsylvania Workmen's Compensation Act, not only requiring an affidavit of full recovery or return to work with no lost earnings, but also affording the employee, in every instance, an automatic formal determination based on full evidentiary hearing, where the employer must sustain the burden of proof.

What is to be drawn from *Auxier*, though, is the fact that the extent of process "due" in the workmen's compensation context is properly a local determination, involving the balancing of local factors, economic, sociologic and political. In this regard, it is meaningful to look to the declarations of the Pennsylvania appellate courts; in particular, decisions from the Commonwealth Court, where workmen's compensation cases are regularly heard. Dealing with due process considerations, the court stated in *Henderson v. W.C.A.B.*, 69 Pa. Commw. 613, 617, 452 A.2d 277, 279 (1982), *petition for allowance of appeal denied* (Pa. March 8, 1983):

> We agree . . . that the suspension of an employee's workmen's compensation benefits by a private insurer prior to a hearing does not violate the employee's rights to due process.

Though not determinative, certainly a declaration by the appellate court charged with review in Pennsylvania workmen's compensation cases should be recognized as persuasive authority on the basis of its peculiar understanding and appreciation of the local considerations that play so large a part in the "balancing" inherent in the due process determination.

In dealing with the return to work situation, the need for or purpose of either prior notice or opportunity to make presentation must certainly be even more emphatically questioned. What "notice" should or could

be given to an employee who must already know himself that he has returned to work? And what "meaningful" prior presentation could be made to the contrary, where in fact such return to work with no lost earnings is the basis for the interim suspension of workmen's compensation benefits, while the employer or insurance carrier must nevertheless proceed, even in the return to work situation, with an automatic formal petition that will go to a final evidentiary determination, in the course of which claimant has ample opportunity for any "presentation" he may wish to make?

Most important is the fact that the supersedeas procedure does not aid, enhance or afford any benefit to the employer or workmen's compensation insurance carrier beyond those they already and always had. Indeed, §413(a) now actually *restricts* the employer's ability to undertake suspension of benefits. *See Henderson v. W.C.A.B.*, 69 Pa. Commw. 613, 618, 452 A.2d 272, 279 (1982), *petition for allowance of appeal denied* (Pa. March 8, 1983). When the intent and operation of the Pennsylvania system of workmen's compensation are recognized and understood, it becomes apparent that any suggestion of employer deprivation of employee's property without due process of law, by an interim suspension of benefits based on physician's affidavit of full recovery or return to work with no lost earnings, while awaiting automatic formal determination of a petition for termination following full evidentiary hearings, is inexplicably anomalous in a Commonwealth known for its extreme liberality to the injured employee.

B. State Action

1) The deprivation must be caused by the exercise of some right created by the state.

This is the first area of inquiry raised in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982), the only one of the three cases decided simultaneously by this Court in which the necessary "state action" was found to exist as basis for due process deprivation. In both of the other two cases, *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and *Blum v. Yaretsky*, 457 U.S. 991 (1982), in spite of "involvement" by state authorities this Court found no "state action."

In *Lugar*, a divided Court found the necessary "state action" to exist where, acting upon a prejudgment attachment procedure embodied in state law, a clerk of the state court issued a writ of attachment, which was then executed by the county sheriff. *Id.* at 924. Addressing that issue in *Lugar*, the Court stated: "The procedural scheme created by the statute obviously is the product of state action." *Id.* at 941. But there the prejudgment attachment "scheme" was intended and designed solely to effect a "taking" of property by the very attachment provided for.

The Pennsylvania Workmen's Compensation Act, on the contrary, is an overall substitution of a "No-Fault" administrative system for the prior common law method of claim determination between employee and employer. Section 413(a), as amended to include now what is referred to as the "automatic supersedeas provision," did not create any right or confer any benefit on the employer; instead, it severely limits and restricts the method by which an employer can now suspend benefits on an interim basis while awaiting the automatic final

determination of a formal petition for termination, which is required of the employer, after liability for workmen's compensation benefits has been established and the employee does not voluntarily agree to termination. *See Henderson v. W.C.A.B.*, 69 Pa. Commw. 613, 618, 452 A.2d 277, 279 (1982), *petition for allowance of appeal denied* (Pa. March 8, 1983).

Appellants therefore urge that the instant case is not ruled by the decision in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), and that there is no proper basis for suggesting any broadening of the application of the first aspect set forth therein, which requires that deprivation be caused by the exercise of some state created right.

2) The deprivation must be effected by a state actor.

The second requirement for "state action" delineated by *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982), is that the party charged with deprivation must be a person who may fairly be said to be a "state actor." Referring to the factual situation presented, the Court determined that there was a "private party's joint participation with state officials in the seizure of disputed property [being] sufficient to characterize that party as a 'state actor'." *Id.* at 941. There, however, the actual "actor" was admittedly the "clerk of the state court," who "issued" a writ of attachment which was then executed by the county sheriff. It was this system, then, created by the state, "whereby state officials will attach property on the *ex parte* application of one party," that the Court found to be prohibited "state action." *Id.* at 942.

Similarly, in oft cited cases where this Court considered constitutional requirements in the context of garnishment actions and prejudgment attachments,

when "state action" was found to exist the "action" was clearly, admittedly, and invariably by a state official who actually took or withheld the property. *See North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). On the other hand, in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978), where a warehouseman sold goods in his possession to satisfy a lien pursuant to a section in the New York Uniform Commercial Code, the Court found "total absence of overt official involvement," which they said "plainly distinguishes this case from the earlier decisions in posing procedural restrictions on creditors' remedies."

As Chief Justice Burger wrote in *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970)), "a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." And speaking through Justice Rehnquist in *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 (1982), the Court declared: "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the state responsible for those initiatives under the terms of the Fourteenth Amendment."

Thus in those cases where the "state actor" requirement was found to satisfy "state action," there was some overt action by a state official to take or withhold property, but in the workmen's compensation system in Pennsylvania, Commonwealth officials take no overt action whatsoever. Any "state participation" here is merely by way of passive administration, in connection

with the petition for termination form, and does not serve, either itself, or in concert or conspiracy with the employer or its workmen's compensation insurance carrier, to take or withhold any property. *Cf. Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970).

Clearly, the interim suspension of workmen's compensation benefits is effected by the employer or workmen's compensation insurance carrier; it is they, and only they, who can and do effect that interim suspension of benefits. The Commonwealth does nothing but record the suspension of payment as documented in the petition for termination, prepared and filed by employer or workmen's compensation insurance carrier, thereby automatically initiating the procedure which includes formal evidentiary hearings for a final determination. Here, there is not the symbiotic relationship of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), where "[t]he State ... insinuated itself into a position of interdependence" with an acting party; nor is there a "sufficiently close nexus between the State and the challenged action of the ... entity so that the action of the latter may be fairly treated as that of the State itself" here, any more than in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

Of relevance too, is the point made by Justice Brennan, writing separately in *Adickes*, where he said, "when a private party acts alone, more must be shown ... to establish that he acts 'under color of' a state statute or authority than is needed to show that his action constitutes state action." 398 U.S. at 210. And most significant is the very statement by this Court, albeit in a footnote, that *Lugar* does *not* hold that a "private party's mere invocation of state legal procedures

constitutes 'joint participation' or 'conspiracy' with state officials satisfying the §1983 requirement of action under color of law." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 n.21 (1982).

Indeed, the Court went on to say in that same footnote that "[t]he holding today . . . is limited to the particular context of prejudgment attachment," *id.*, and so by no supposed analysis or interpretation can *Lugar* be deemed authority for declaring existence of a "state actor" in the case at bar, involving the Pennsylvania workmen's compensation system. As in connection with the first element in *Lugar*, concerning supposed deprivation of rights created by the state, but even more so in analyzing the second element of "state actor," a significant and unwarranted extension of *Lugar* would be required before the theory advanced there could be used as any basis for determining "state action" here.

Though the instant appellants are all private insurance companies and a private employer, the situation is not actually any different when the employer is some department of the Commonwealth or the insurance company is the State Workmen's Insurance Fund. In both cases, it is "action" as an employer and/or as an insurance carrier which effects the interim suspension of workmen's compensation benefits, in the same manner and to the same extent as is the case with all "private" employers and insurance carriers. No greater weight or authority attaches to a suspension by a Commonwealth employer or the "State Fund." There is no mantle of governmental approval either given or implied. Contrary to the decision of the district court, 579 F. Supp. at 229, there is no necessary determination that where a Commonwealth employer or the State Workmen's Insurance Fund effects interim suspension of workmen's

compensation benefits, "the state is the actor." *Accord Polk County v. Dodson*, 454 U.S. 312 (1981). Here, the "cloth[ing] with . . . authority" that troubled Justice Blackmun in dissent, *id.* at 329, is absent.

The "action" taken by Commonwealth personnel, as employer, or State Fund, is not by virtue of their being "state officials," but rather and only because they are in the position of traditional employers and/or insurance carriers. Indeed, it is perhaps significant to note that while plaintiffs named the Commonwealth officials in their complaint, with prayer for both injunctive and declaratory relief, the consent decree drafted by the named parties themselves and approved by the court does not provide for any such relief whatsoever against those officials! (Apdx., 115a, 116a.)

On reflection, it should be recognized that questions of deprivation of constitutionally protected property without due process of law and of state action are necessarily intertwined. Both may, and indeed should, depend on some reasonable "balancing" which, in a workmen's compensation context, involving a system in force in every state, but varying significantly from state to state with regard to both substance and procedure, suggests that great attention should be paid, and perhaps final reliance placed upon, local considerations. For this case to come within the net of constitutional prohibition, then, the Court must reach beyond any interpretation of *Matthews v. Eldridge*, 424 U.S. 319 (1976), on the issue of "due process," and stretch beyond the holding in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), on the issue of "state action."

This Court can, of course, make such extensions, but surely there is serious question as to whether any sound or compelling reason exists to do so, where the result would be to not only upset an already liberally balanced workmen's compensation system in Pennsylvania, but also to cast a far reaching shadow on the operation of every other system of workmen's compensation administration presently in use throughout the nation, and by the federal government itself.

The questions thus presented, as to whether there is any deprivation of constitutionally protected property, by state action, without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, to warrant relief under §1983 of the Civil Rights Act, have not previously been addressed by this Court in a workmen's compensation context, and in view of national implication and effect, should therefore be reviewed and resolved following submission of briefs and presentation of oral argument.

Conclusion

For the reasons stated, this Court should note probable jurisdiction.

Respectfully submitted,

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Dated: November 14, 1984

84-768
No. _____

FILED
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ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

ALLSTATE INS. COMPANY, ARGONAUT INS. COMPANY, HARLEYSVILLE INS. COMPANY, OHIO CASUALTY GROUP OF INS. COMPANIES, ROYAL INS. COMPANY, SUN COMPANY, INC., TRAVELERS INS. COMPANY and WAUSAU INS. COMPANIES,

Appellants/Objecting Members of Defendant Class,

vs.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, CHARLES SAMUEL, Individually and on behalf of all others similarly situated,

Appellees/Plaintiffs,

and

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS ASSOC. INS. COMPANY, AMERICAN MUTUAL LIABILITY INS. COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORP. and all other insurance carriers and/or self-insured employers similarly situated,

Defendants (Appellees).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX

Final Opinion and Order

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 76-429.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, and CHARLES SAMUEL Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORPORATION, and all other insurance carriers and/or self-insured employers similarly situated,

Defendants.

Filed July 30, 1984; MICHAEL E. KUNZ, Clerk.
By (Illegible) Dep. Clerk.

Before: ADAMS, *Circuit Judge,**
GREEN and POLLAK, *District Judges.*

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* Honorable Arlin M. Adams, United States Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

Final Opinion and Order.

OPINION

Per Curiam July 30, 1984

I. INTRODUCTION

We have previously resolved the central constitutional issues in this case. *Baksalary v. Smith*, 579 F. Supp. 218 (E.D. Pa. 1984). We now address the question of what remedy our prior holdings require or permit. The named parties to this bilateral class action have submitted for approval a proposed consent decree which undertakes to resolve all but one of the remaining remedial issues. The proposed consent decree accompanies this Opinion as an appendix. The remedial issue not dealt with by the consent decree has been submitted to the court to be determined as a litigated judgment.

For reasons developed at some length in section II hereof, we have determined that the proposed consent decree represents a fair, adequate, and reasonable resolution of the remedial questions which it addresses. The accompanying Order therefore approves it pursuant to Federal Rule of Civil Procedure 23(e). Further, for reasons elaborated in section III, the accompanying Order resolves the single remaining litigated remedial issue.

Our previous Opinion has described in detail the facts and procedural history of this litigation through February 1, 1984. *See Baksalary*, 579 F. Supp. at 219-224. In this section, we review that history briefly before describing in detail the issues now before the court.

This litigation commenced in 1976. In it, plaintiffs successfully challenged the constitutionality of the automatic supersedeas provision of section 413(a) of the

Pennsylvania Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1983).[1] This action has proceeded before a three-judge district court convened pursuant to 28 U.S.C. §2281 (repealed). (That court initially consisted of Circuit Judge Adams and District Judges Fogel and Green. After Judge Fogel left the bench Judge Pollak replaced him on the three-judge court.) Plaintiff and defendant classes were certified pursuant to Federal Rule of Civil Procedure 23(b)(2). The plaintiffs' class includes "all persons who have been or will be receiving benefits pursuant to the Pennsylvania Workmen's Compensation Act and who have had or will have such benefits terminated, suspended, reduced or otherwise deprived without advance notice and opportunity for a prior evidentiary hearing." Order of Judge Fogel (March 27, 1978). The defendants' class includes "all insurance companies, mutual associations and employment establishments authorized to insure the payment of Pennsylvania Workmen's Compensation benefits who have acted, or will act, to terminate,

[1] The term "automatic supersedeas provision" has been used in this litigation to refer to the first sentence of Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1983). That sentence provides:

> The filing of a petition to terminate or modify a notice of compensation payable or a compensation agreement or award as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require only when such petition alleges that the employe has returned to work at his prior or increased earnings or where the petition alleges that the employe has fully recovered and is accompanied by an affidavit of a physician on a form prescribed by the [Bureau of Workers' Compensation] to that effect which is based upon an examination made within fifteen days of the filing of the petition.

suspend, reduce, or otherwise deprive benefits to previously eligible claimants without advance notice and opportunity for a prior evidentiary hearing . . . ." *Id.*

Discovery was extensive and took years to complete. After hearing and argument on April 7, 1983, we filed an Opinion, on February 1, 1984, which concluded

> that operation of the automatic supersedeas authorized by section 413 of the Pennsylvania Workmen's Compensation Act involves conduct reasonably attributable to the state and that section 413 does not accord worker's compensation recipients due process. Thus, plaintiffs have made out a violation of 42 U.S.C. §1983 (Supp. V 1981). Plaintiffs are entitled to entry of a judgment declaring the unconstitutionality of the automatic supersedeas provision of section 413.

Baksalary, 579 F. Supp. at 233.[2]

After having decided the legal and factual issues leading to a determination of liability, we found ourselves with little guidance from the parties as to the appropriate form of relief. The parties had concentrated their legal arguments on the question of the automatic supersedeas provision's constitutionality and had not given any extended treatment to the remedy which a finding of unconstitutionality would require or permit. Accordingly, we did not accompany the February 1 Opinions with a remedial Order. Instead, we ordered the parties to submit a joint proposed form of remedial order, or alternative proposed remedial orders, by February 15, 1984.

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[2] Judge Adams' separate Opinion, which Judges Green and Pollak joined, reached the same conclusion. 579 F. Supp. at 237.

On February 14, 1984, counsel for plaintiffs informed Judge Pollak's chambers that the parties had not agreed on a joint proposed form of order, but that the court would receive several alternative remedial requests from the various named parties. On receipt of this information, the court established a schedule which permitted the parties fully to brief their respective positions on the remedy appropriate to this case.

On February 15, 1984, eight proposed forms of remedial order were filed: one by plaintiffs, one by the Commonwealth Defendants,[3] two by the State Workmen's Insurance Fund ("SWIF") and four by the School District of Philadelphia and several private insurance companies. The parties submitted initial briefs in support of their positions on March 6, 1984, and reply briefs on March 12.

Upon examination of the proposed forms of order and the briefs supporting them, we determined that several of the remedial issues in dispute did not require oral argument. On March 15, 1984, we filed a Memorandum and Order which decided these remedial questions. First, we declared that any invocations of the automatic supersedeas provision after March 15, 1984, would violate the due process clause of the Fourteenth Amendment. Order, ¶1 (March 14, 1984). We also expressly reserved judgment on whether any invocations of the automatic supersedeas between February 1, 1984, and March 15, 1984—if in fact any had taken place—would be subject to a later declaration of

[3] Throughout this litigation the parties and the court have referred to defendants Paul J. Smith, C. John Urling, William J. Sheppard, Grace M. Sloan, and their successors in their official capacities, as the "Commonwealth Defendants."

invalidity. Memorandum at 4 (March 15, 1984). We also were at pains to make clear that this litigation concerned the automatic supersedeas provision of section 413(a) of the Pennsylvania Workmen's Compensation Act, and *only* that provision. Memorandum at 4-5; *see also Baksalary*, 579 F. Supp. at 233 ("Invalidation of the automatic supersedeas provision does not call for invalidation of any other provision of the Workmen's Compensation Act . . .").

The March 15 Order also considered both plaintiffs' and defendants' requests for injunctive relief. Plaintiffs desired immediate reinstatement of worker's compensation benefits and complete retroactive recovery for all members of the plaintiff class against whom a member of the defendant class had invoked the automatic supersedeas provision, and who had not received a final decision from a referee. Defendants, on the other hand, all took the position that this court should not award relief to any individual against whom the automatic supersedeas provision was invoked prior to the date of the final remedial order in this case. Certain defendants also requested that this court's injunctive relief provide a procedure alternative to the automatic supersedeas provision which would permit self-insured employers and insurers to suspend worker's compensation benefits prior to a final decision by a referee on a termination petition.

We felt that oral argument on the appropriate nature and scope of injunctive relief would be helpful. But we concluded that we did not wish to hear argument on proposals that this court frame a procedure to be substituted for the automatic supersedeas we had found invalid. We stated that we

> see no circumstances under which we would grant injunctive relief mandating adoption of a procedure of our selection to replace the automatic supersedeas provision. A federal court cannot enact state law. Further, we do not read the Workmen's Compensation Act to require adoption of any of the proposed alternative procedures.

Memorandum at 6-7 (March 15, 1984).

The March 15 Memorandum and Order left open several broad areas of possible remedy:

First, we did not resolve the dispute between plaintiffs and the Commonwealth Defendants over whether this court should grant any injunction at all covering future invocations of the automatic supersedeas provision. The Commonwealth Defendants argued that a declaration alone sufficed. We shall refer to that question as the prospective injunction question.

Second, we did not decide whether, and under what circumstances, a self-insured employer or insurer would be ordered to resume payment of benefits to members of the plaintiff class against whom the employer or insurer had invoked the automatic supersedeas provision. We shall refer to this question as the resumption question.

Third, we left undetermined the question whether, and under what circumstances, a self-insured employer or insurer would be ordered to pay retroactive benefits to members of the plaintiff class against whom the employer or insurer had invoked the automatic supersedeas provision. We shall refer to this question as the back-benefits question.

Fourth, we did not address plaintiffs' request for a declaration of their entitlement to recovery of reasonable attorneys' fees pursuant to 42 U.S.C. §1988.

The March 15 Order scheduled oral argument on these four issues for March 28, 1984. That date was subsequently changed to April 3. On the morning of April 3, counsel jointly advised the court that they were finally engaged in settlement discussions and those discussions appeared likely to be fruitful. Accordingly, we assented to a continuance of the argument at least for a few hours. In mid-afternoon of April 3, counsel announced on the record tentative agreement on the substance—albeit not the wording—of a proposed consent decree which counsel believed the named parties would ratify. Accordingly, the scheduled argument was cancelled and the court, by Order filed on April 4, 1984, established a schedule for the submission of a proposed consent decree. The schedule announced on April 4 was modified by Order of April 19. On April 27, 1984, the named parties submitted a joint motion for preliminary approval of a proposed consent decree. We suggested one amendment to the proposed decree, which the parties agreed to. By Order of May 14, 1984, we preliminarily approved the proposed consent decree, as amended, and approved transmission of notice packages to members of the plaintiff and defendant classes.

The proposed consent decree purports to settle all outstanding remedial questions but one. Plaintiffs have demanded immediate reinstatement and back benefits for any member of the plaintiff class against whom a member of the defendant class may have invoked the automatic supersedeas provision after February 1, 1984,

the date of our liability. Opinions in this matter. The named defendants represented that any named defendant who had invoked the automatic supersedeas between February 1 and March 15, the date of our declaratory Order, had done so inadvertently and had taken steps to reinstate the terminated employee with full back benefits. The named defendants felt, therefore, that they could not, on this issue, speak for other members of the defendant class who might have invoked the automatic supersedeas between February 1 and March 15 and who might have felt entitled to have done so. Therefore, the named defendants represented that they could take no position on plaintiffs' demands for reinstatement and back benefits on behalf of post-February 1 pre-March 15 terminees. The parties desired to submit this question to the court for a litigated judgment.

As required by Federal Rule of Civil Procedure 23(e), the named parties arranged for transmission of notice of the proposed consent decree to all known members of the plaintiff and defendant classes. These non-named class members had the opportunity to comment and object to the proposed settlement until June 13, 1984. Quite a number of both plaintiffs and defendants availed themselves of that opportunity. We also used the same procedure to provide non-named defendants an opportunity to respond to plaintiffs' claims for reinstatement and back benefits on behalf of post-February 1 pre-March 15 terminees.

This court held a hearing on June 18, 1984. At that hearing, several objectors made oral presentations in opposition to the proposed consent decree and counsel for the named parties made presentations in support of

the proposed decree. In addition, several defendants made oral presentations in opposition to, and plaintiffs made a presentation in support of, the relief requested by plaintiffs for post-February 1 pre-March 15 terminees. In the course of the hearing, a substantial issue arose concerning the import of the proposed consent decree for a claimant's entitlement to receive both worker's compensation benefits and salary when the claimant has returned to work at the same or higher wage. We gave the parties until June 25 to make further submissions on that issue. They have made such further submissions. Therefore the entire case is now before the court for a decision on the fairness of the proposed consent decree and on the propriety of the relief requested by plaintiffs for post-February 1 pre-March 15 terminees.

II. FAIRNESS OF PROPOSED CONSENT DECREE

A. *Applicable Standards*

Federal Rule of Civil Procedure 23(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." We have already approved the manner of notifying class members and we are satisfied that the parties have provided notice as suggested in their joint motion for preliminary approval of the proposed consent decree. Thus, we must now determine whether to approve the proposed compromise.

In considering whether approval is appropriate, we must decide whether "the proposed settlement [is] fair, adequate and reasonable." *Girsh v. Jepson*, 521 F.2d 153,

157 (3d Cir. 1975). In making that determination, the district court carries out a "fiduciary responsibility, as the guardian of the rights of the absentee class members . . . ." *Id.* The determination ordinarily requires that the district court make certain findings of fact. *See Girsh*, 521 F.2d at 159. Typically this involves scrutiny of a list of nine factors—albeit not an exclusive list—enunciated by the Court of Appeals for the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), and adopted by our Court of Appeals in *Girsh:*

> (1) the complexity, expense and likely duration of the litigation . . .; (2) the reaction of the class to the settlement . . .; (3) the stage of the proceedings and the amount of discovery completed . . .; (4) the risks of establishing liability . . .; (5) the risks of establishing damages . . .; (6) the risks of maintaining the class action through the trial . . .; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . .; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation . . . .

521 F.2d at 157; *cf.* 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶23.80[4] at pp. 23-520 to 23-521 (2d ed. 1982).

While we view ourselves as fiduciaries for the absent class members, and while we shall attempt to decide whether the proposed consent decree provides a fair, adequate, and reasonable settlement of this matter, we believe that this case presents a situation somewhat out of the ordinary. The named parties achieved a tentative

settlement on the very day scheduled for oral argument on certain unresolved remedial issues. We had determined two months earlier that invocation of the automatic supersedeas provision violated the due process clause, and we had already rejected certain requested forms of relief and granted others. In effect, the court's only remaining tasks were to elaborate the remedial implications of our ruling on liability within the range of remedies laid out in our March 15 Memorandum. This is not the typical case where settlement evaluations require predictions of the probability that the tribunal would reach one or another substantive result; the central issues had been resolved.

With these thoughts in mind, we analyze, in the light of our prior rulings in this case, the terms of the proposed consent decree and the various objections to the proposed decree which have been advanced. We have considered whether the proposed consent decree is within the range of possible remedial results flowing out of our liability opinions of February 1 and our partial remedial decision of March 15. We have found no aspects of the proposed consent decree inconsistent with those rulings and we find the proposed consent decree well within the range of reasonably expectable outcomes based upon our earlier rulings. Further, many of the objections raised to the proposed consent decree suggest relief inconsistent with our earlier rulings. We do not think that any such objection bears upon the fairness, adequacy, or reasonableness of a settlement proposed after the court has made rulings adverse to the objector's position.

We begin with a discussion of the reasons why we believe that this proposed consent decree fairly balances

the risks faced by the plaintiff class and the risks faced by the defendant class in anticipating our remedial decision. We next turn to a discussion of particular objections to the proposed consent decree.

B. *Evaluation of Proposed Consent Decree as Against the Range of Possible Outcomes*

In our view both plaintiffs and defendants faced substantial risks in the remedial stage of this litigation. The proposed settlement replaces those risks with a proposed certainty advantageous to both sides. Thus, the proposed decree gives plaintiffs a much more favorable result than the most pro-defendant result possible under our prior rulings. At the same time, the proposed decree gives defendants a much more favorable result than the most pro-plaintiff result possible under our prior rulings. So viewed, the proposed consent decree provides a fair accommodation of the parties' extreme positions.

Although this court's Opinions of February 1, 1984, did not foreclose the possibility that our remedial decree would include injunctive relief, the single remedial provision plainly *required* by those Opinions was a declaration of the invalidity of the challenged statute. *See Baksalary*, 579 F. Supp. at 233. We made that declaration on March 15. On March 15 we specifically adverted to the Commonwealth Defendants' argument against any relief other than a declaration of invalidity. Memorandum at 5-6 (March 15, 1984). The Commonwealth Defendants urged the court to permit the ordinary enforcement mechanisms of the Bureau of Workers' Compensation to implement any declaration of this court. That comity argument had a certain force. It

certainly presented plaintiffs with a substantial risk that they would receive no relief beyond that granted on March 15.

In addition, plaintiffs faced the risk and delay of an appeal.[4] The appellate court might have overturned this court's legal pronouncement of February 1 and any aspect of the relief which we might have granted. In addition, even if, in the event, plaintiffs' position was ultimately sustained on appeal, this court, or the appellate court, might have stayed enforcement of some or all of this court's decree pending appeal—thereby postponing, for perhaps an additional year, any effective vindication of the rights of plaintiff class members. *See Baksalary*, 579 F. Supp. at 224-225.

Defendants also faced considerable risks in the remedial portion of this litigation. Defendants argued strongly for no recovery of back benefits, no resumption of benefits, and a prospective injunction dating from several weeks after the final remedial order in this case. For their insistence on purely prospective relief to have prevailed, defendants would have to have persuaded this court that our case met the three-factor nonretroactivity

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[4] Plaintiffs also faced the possibility that there would be not one appeal but two appeals pursued concurrently. 28 U.S.C. §1253 provides, of course, that an appeal from a three-judge district court's grant (or denial) of an injunction goes to the Supreme Court. *See Poe v. Gerstein*, 417 U.S. 281 (1974); *Oldroyd v. Kugler*, 461 F.2d 535, 539 (3d Cir. 1972). But it appears that an appeal from so much of a three-judge district court's judgment as grants (or denies) *declaratory* relief goes to the court of appeals. *Gerstein v. Coe*, 417 U.S. 279 (1974).

test set out in *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971).[5]

Had we granted an immediate resumption of benefits, or had we granted back benefits, defendants stood to incur a substantial liability. In the event that defendants appealed and both this court and the appellate court denied a stay, defendants would have had to continue paying substantial amounts during the pendency of an appeal. Had the appeal been successful, defendants might then have found that the interim pay-outs to

[5] It is not clear that this case presents a situation where the ordinary rule of retroactive application of constitutional decisions should not prevail. *Chevron Oil* prescribes a strict test for nonretroactive application:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relief . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker . . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." Cipriano v. City of Houma. . . .

404 U.S. at 106-107; *see also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858, 2880 (1982).

Further, it is not at all clear that we would have taken the same view of nonretroactivity as did defendants in the event that we found *Chevron Oil* applicable. For example, it may be plausibly argued that, even if *Chevron Oil* applied, it would merely proscribe retroactive relief in the form of back benefits, while permitting immediate resumption of benefits to terminees who had not received final decisions from referees.

members of the plaintiff class were, as a practical matter, unrecoverable.

The proposed consent decree represents a fair, adequate, and reasonable compromise between the possible extreme results in this case. The proposed decree incorporates our earlier grant of declaratory relief. Consent Decree ¶4. In addition, it includes a full prospective injunction effective on the date of the decree's final approval. Consent Decree ¶¶5-6. The decree accommodates the defendants' risk of substantial retroactive liability by providing for resumption of benefits and the award of back benefits only to those whose claims have not yet been finally adjudicated by a referee and who receive favorable rulings at a "special supersedeas hearing" to be conducted within sixty days of the entry of the consent decree. Consent Decree ¶¶7-14.[6] A claimant would remain without benefits if a referee determined at the time of the special supersedeas hearing that the self-insured employer or insurer who had invoked the automatic supersedeas provision against him would have qualified for a non-automatic supersedeas on the evidence presented at the special hearing. Consent Decree ¶¶15-18; *see also* Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1983) (second sentence); 34 Pa. Admin. Code §§131.31-131.33 (Shephard's 1982).

The proposed consent decree accommodates plaintiffs' interests in two ways. First, it provides for some resumption of benefits with back benefits after a result favorable to the claimant at the special supersedeas hearing, or, if a hearing is not held or no decision is

[6] No such hearing is required if all evidence has been presented at a final hearing on the merits. Consent Decree ¶19.

rendered, after sixty-seven days. Consent Decree ¶14. Second, the plaintiffs avoid the risks entailed in an appeal from the court's liability decision by one or more of the named defendants. Consent Decree ¶¶3, 29.

The proposed consent decree also settles the question of attorneys' fees under section 1988 without litigation, Consent Decree ¶¶26-28, a result much to the benefit of all parties. Moreover, plaintiffs' counsel represented at the fairness hearing that he had consented to a cap on plaintiffs' fee award under the consent decree of $300,000 for eight years' work. The burden of paying the award is to be allocated among nine hundred defendants (pursuant to a formula which would require of most defendants only a very modest contribution).

We therefore find that the proposed consent decree represents a fair, adequate, and reasonable settlement of the remaining remedial issues in this case viewed from the perspective of the range of reasonably anticipatable outcomes as of April 3, 1984.

C. *Objections*

Reactions of both classes are factors to be considered by the court in deciding whether to approve a consent decree. The classes have manifested their reactions by the filing (or not filing) of objections to the proposed decree. As counsel for plaintiffs noted at the fairness hearing, a rather small proportion of all non-named class members filed objections to the proposed decree. While this is not dispositive, we think it deserving of some weight. That is to say, we are of the view that the non-opposition of the vast majority of class members somewhat neutralizes the generally negative tone of those who did file objections.

1. *Inclusion of Return to Work Cases*

The automatic supersedeas provision covers two sorts of cases. *See Baksalary,* 579 F. Supp. at 221. The first sort consists of cases in which an insurer or self-insured employer files a termination petition together with the affidavit of a physician which recites that the claimant subject to termination has fully recovered. The second sort consists of cases in which the insurer or self-insured employer avers that the claimant subject to termination has returned to work at the same or higher wage.

The declaratory relief and the injunctive relief granted by the proposed consent decree do not distinguish between physician's-affidavit and return-to-work cases.[7] Several non-named members of the defendant class have objected to the inclusion of return-to-work cases. They represent that the failure to distinguish them from physician's-affidavit cases suggests that a claimant who has returned to work at the same or higher wage has an entitlement to continue receiving both compensation and wages until a referee can issue a final decision on a termination petition.

With the court's encouragement, counsel for the named parties and at least one of the objecting defendants, Philadelphia Electric Company, have agreed to a statement of the import of the proposed consent decree

[7] The proposed consent decree does make certain procedural distinctions between physician's-affidavit and return-to-work cases in the entitlement to a special supersedeas hearing. All those terminated upon a physician's affidavit who have contested their termination cases and who have yet to receive a referee's decision will receive special supersedeas hearings. One terminated upon an assertion that he has returned to work will only receive such a hearing if he files a form with the Bureau of Workers' Compensation. Consent Decree ¶¶7, 8.

with respect to this issue. We endorse and adopt this statement:

> The Consent Decree does not entitle any claimant to receive both compensation payments and salary during discrete periods of time when that claimant has actually returned to work at wages equal to or greater than his/her pre-injury wages. The Consent Decree does however contemplate the payment of compensation for those periods during which a claimant, having previously returned to work at pre-injury or greater wages, again leaves his/her job as a result of a work-related injury. In addition, the Consent Decree contemplates that those claimants who have returned to work will be entitled to payment of all compensable medical expenses until or unless a Referee enters an Order granting a request for supersedeas of such benefits or a decision is rendered and received granting a termination.

Letter from Harold I. Goodman, Esq., to Hon. Arlin M. Adams, Hon. Clifford Scott Green, and Hon. Louis H. Pollak (filed in this action June 25, 1984).

To the extent, however, that the objecting defendants contend that the proposed decree is unfair because it enjoins invocation of the automatic supersedeas provision in return-to-work cases, their objections have no merit. The named parties arrived at their proposed consent decree on the basis of our prior rulings. Our principal February 1 Opinion expressly addressed both aspects of the automatic supersedeas provision. *Baksalary*, 579 F. Supp. at 221. Moreover, both of our February 1 Opinions were grounded on the failure of the

automatic supersedeas procedure to provide any notice to a terminated employee and its failure to provide any opportunity to contest termination before the termination takes effect. 579 F. Supp. at 233 and 237. This failure to provide notice applies in both the return-to-work and physician's-affidavit cases. Because this court's legal rulings have treated the two aspects of the automatic supersedeas symmetrically, the proposed consent decree quite reasonably also treats the two aspects symmetrically.

To the extent that the objecting defendants contend that the proposed consent decree is unfair because it fails to provide an alternative to the automatic supersedeas provision in return to work cases, their position is again without merit. On March 15, we held that we would not, under any circumstances, require adoption of a particular alternative procedure to the automatic supersedeas; we believed that to be the prerogative and responsibility of the Pennsylvania Legislature. Memorandum at 6-7 (March 15, 1984). Plaintiffs, therefore, had no reason to agree to an alternative procedure for return-to-work cases.

In this regard, we reiterate two of our holdings. First we do not understand the consent decree as creating any entitlement to the concurrent receipt of wages and of compensation benefits other than compensation for medical expenses. No claimant may properly receive both. Second, the procedures available for vindicating employers' and insurers' privilege not to pay both wages and compensation concurrently must be embodied in provisions of the Workmen's Compensation Act other than the automatic supersedeas provision of Section

413(a) which we are invalidating. All provisions of that Act other than the first sentence of the fourth paragraph of section 413(a), the automatic supersedeas provision, remain intact. Specifically, neither the rulings of this court nor the provisions of the proposed consent decree affect in any way the operation of sections 306(b) or 413(c) of the Act, Pa. Stat. Ann. tit. 77, §§512, 774.2 (Purdon Supp. 1983). *Cf.* Memorandum at 4-5 (March 15, 1984). If the other provisions of the Workmen's Compensation Act, as currently interpreted by the Pennsylvania courts, do not adequately ensure that a claimant will not wrongfully receive both compensation benefits and wages, then the Pennsylvania courts or legislature, and not this court, should address that problem. *Cf. The Sansom Committee v. Lynn*, No. 83-1121, slip op. at 11 ff. (3d Cir. June 1, 1984) (Becker, J., concurring).

2. *Time Limit for Special Supersedeas Hearings*

Paragraph 14 of the proposed consent decree provides that all special supersedeas hearings will be conducted within sixty days of the entry of the Order approving the proposed consent decree. Further, the referee conducting these hearings 'must render his decision within seven days of the end of this sixty-day period. *Cf.* 34 Pa. Admin. Code §§131.33(b) (Shephard's 1982) (regulation concerning non-automatic supersedeas hearings). Paragraph 14 further provides that in the event that no hearing is scheduled within sixty days, or in the event that the referee does not render his decision on the special supersedeas within sixty-seven days of the entry of this court's Order, then the claimant will receive automatic resumption of future benefits and automatic

back benefits. The claimant does not receive automatic resumption when the referee finds that the claimant or his counsel has caused the delay.

Several members of the defendant class have objected to paragraph 14 on the ground that the additional burden on the Bureau of Workers' Compensation will make it likely that many claimants will not receive decisions in their special supersedeas proceedings within sixty-seven days. These defendants contend that because delay beyond sixty-seven days may arise through no fault of the insurer or employer, the insurer or employer should not be obligated automatically to reinstate the claimant with full back benefits, unless the insurer or employer had caused the excessive delay.

The accommodation contemplated by the proposed consent decree seems to us fair, adequate, and reasonable. If this matter had proceeded to a litigated judgment, defendants faced the real possibility that this court would have ordered reinstatement of all claimants contesting their termination petitions who had been terminated pending the referee's decision under the automatic supersedeas provision. We had previously held that the automatic supersedeas procedure did not accord plaintiffs due process. Certainly on the resumption question defendants had no clear entitlement to rely on an unconstitutional procedure, albeit invoked before this court's decision to that effect. Therefore, defendants obtained a significantly less-than-worst-case result by virtue of the proposed consent decree.

Moreover, the Commonwealth has actively participated in the settlement negotiations leading to the proposed consent decree. The Commonwealth has abandoned its

position that this court ought impose no obligations upon it and has embraced the sixty-seven day rule as fair and as administratively feasible. For us to tell the Commonwealth that it could not fulfill the administrative commitment it has joined in recommending would smack of judicial impertinence.

Finally, a consent decree deferring resumption of benefits pending the outcome of the administrative hearing should quite properly have provided some outside time limit for that outcome to be reached. Without such a time limit, defendants could have had the benefits of an unconstitutional deprivation indefinitely.

For these reasons, we do not find the sixty-seven day limit in any way unfair or unreasonable.

3. *Attorneys' Fees*

Several members of the defendant class have objected to the allocation of plaintiffs' attorneys' fees recovery among all named and non-named defendants. The proposed consent decree would allocate the plaintiffs' attorneys' fees in the same proportion as the allocation of defendants' contributions to the Workmen's Compensation Administration Fund for 1983. Consent Decree ¶27.

The objections come in two forms. Some objecting defendants challenge the liability in any form because they had no notice of this action. Their complaints of lack of notice would be appropriate if the defendant class had been certified pursuant to Federal Rule of Civil Procedure 23(b)(3). However, the class was certified pursuant to Rule 23(b)(2). The notice provisions of Rule

23(c)(2) do not apply to a Rule 23(b)(2) class. Accordingly, defendants had no option to participate or not participate and they had no entitlement to notice. *Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956, 962-963 (3d Cir. 1983).

Some objecting defendants take issue with the allocation formula. They contend that the formula is completely arbitrary and, in particular, bears no relation to the use that any defendant has made of the automatic supersedeas procedure. We agree that the proposed consent decree will not allocate plaintiffs' attorneys' fees in proportion to the number of automatic supersedeas petitions filed by each defendant. Plaintiffs' counsel has represented that the allocation formula essentially assesses each defendant in proportion to its total participation in the workers' compensation program.

We do not believe that this allocation scheme makes the proposed consent decree unfair, inadequate, or unreasonable. In the first place, the $300,000 cap placed upon plaintiffs' attorneys' fees recovery makes the difference between this allocation scheme and any other reasonable allocation scheme rather small for any one of the nine hundred members of the defendant class.[8] Further, one would be hard put to establish a method for allocating plaintiffs' attorneys' fees which would appear significantly less arbitrary. The method suggested by defendants—allocation upon the basis of past use of the automatic supersedeas provision—would surely prove expensive, and might prove impossible, to effectuate.

[8] The objectors did not know of this cap at the time they filed their objections, as the cap only became known at the time of the fairness hearing.

This is because the Bureau of Workers' Compensation has no computerized records of the invocations of the automatic supersedeas provision which identify the insurer or employer filing the automatic supersedeas petition.

Accordingly, we find the proposed allocation scheme a fair, adequate, and reasonable accommodation of the practicalities of assessing plaintiffs' section 1988 recovery.

5. *Scope of Relief to Plaintiffs*

Several plaintiffs have objected to their exclusion from relief under the proposed consent decree. These objections come in two forms. First, some objectors seek relief from a supersedeas even though they have not been subject to an invocation of the *automatic* supersedeas provision of section 413(a). Second, some objectors seek relief even though they have obtained a final referee's decision.

A consent decree which does not address the claims of those not subject to an automatic supersedeas in this case cannot, for that reason, be unfair, inadequate, or unreasonable. From its inception until now, this case has dealt only with Section 413(a). The remedial portion of this litigation has involved the named parties in an attempt to litigate, and then to compromise, the remedial implications of our February 1 and March 15 Opinions. A consent decree arising in this context which does not address what has not been litigated does not fail on that account. If it be the case that what we have decided has implications for situations other than the invocation of the automatic supersedeas, exploration of those implications must await another lawsuit.

The proposed consent decree also does not appear to us unfair, inadequate, or unreasonable because it does not provide relief to those who have had a referee's decision on the merits in their termination petition dispute. Consent Decree ¶7. We have made clear that this case concerns only "the right to compensation between the time an employer or insurer petitions for termination or modification and the time the referee makes a final determination." *Baksalary*, 579 F. Supp. at 221. After that time, the automatic supersedeas has no independent force; the referee's decision on the merits of the termination petition controls. Moreover, after an individual has received a referee's decision on the merits, none of our reasoning concerning notice and an opportunity to be heard applies; the individual has received his hearing. *Cf. Cohen v. City of Philadelphia*, No. 83-1575 (3d Cir. June 6, 1984); *Vinson v. Freeman*, Civil Action No. 81-0643 (E.D. Pa. June 29, 1984).

For the foregoing reasons, we find that the proposed consent decree, as amended by our Order of May 14, 1984, is fair, adequate, and reasonable. Therefore, the accompanying Order approves the decree pursuant to Federal Rule of Civil Procedure 23(e).

III. LITIGATED ISSUE

As discussed above, the named parties, proposed consent decree does not resolve the question of what remedy, if any, should be awarded claimants against whom a member of the defendant class may have invoked the automatic supersedeas provision between February 1, 1984, the date of this court's liability Opinions, and March 15, 1984, the date of this court's declaratory Order. Plaintiffs have moved for mandatory

relief requiring immediate resumption of post-February 1 pre-March 15 terminees' benefits together with an immediate award of back benefits to the date of the automatic supersedeas. Several members of the defendant class other than named defendants oppose such an award.

Much of the parties' discussion of this issue turns on whether the defendants who invoked the automatic supersedeas provision after February 1, 1984, had any justification for doing so. We find this analysis unhelpful. We see no reason to characterize any defendant's activity as "wrongful" or not "wrongful." Instead, we believe that we may usefully commence our discussion of the relief appropriate to post-February 1 pre-March 15 terminees with consideration of the retroactive impact of our March 15 declaration of the automatic supersedeas provision's unconstitutionality.

Our March 15 Memorandum explicitly reserved the question of our declaration's retroactivity. Ordinarily, judicial decisions operate retroactively in our system of precedent. *Solem v. Stumes*, 104 S. Ct. 1338, 1341 (1984). Nevertheless, a court may limit its holdings' effect and deny retroactive relief when the court's decision meets the three criteria enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Specifically, a court will take the unusual step of denying retroactive relief when its decision was so novel as to be unpredictable, when retroactive application of the court's decision will retard the holding's purpose, and when retroactive application of the decision will produce substantial inequity. *Chevron Oil*, 404 U.S. at 106-107; *see also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 102 S. Ct.

2858, 2880 (1982); *cf. Solem v. Stumes*, 104 S. Ct. at 1341 (different but analogous formulation in criminal context).

On February 1, 1984, we announced our constitutional conclusion that the automatic supersedeas provision of the Pennsylvania Workmen's Compensation Act did not accord procedural protections required by the due process clause. On March 15 we formally declared that provision unconstitutional. As applied to invocations of the automatic supersedeas provision between February 1 and March 15, our March 15 declaration quite clearly does not meet the stringent requirements of *Chevron Oil*. It was not a new holding; its retroactive application will not retard its purpose, and its retroactive application will not produce substantial inequity.[9]

We therefore find that the *Chevron Oil* factors do not militate in favor of the nonretroactive application of our March 15 declaration of the automatic supersedeas provision's invalidity. We find that, as of February 1, 1984, any invocation of the automatic supersedeas violated the constitutional rights of the worker's compensation claimant involved. We find that immediate resumption of benefits and an award of back benefits with interest provide the appropriate relief for this constitutional deprivation.

Any award must clearly include immediate resumption of benefits. No defendant should be entitled to continue

[9] On March 15 we not only reserved the question of our declaration's retroactivity to February 1, but we also reserved the question of our declaration's retroactivity to invocations of the automatic supersedeas provision before February 1, 1984. The latter, in our view, presented a much more difficult problem. However, the consent decree has obviated the need for a decision on the more difficult portion of the retroactivity issue.

withholding compensation on the basis of a constitutionally invalid supersedeas. Further, we believe that restitution of the compensation that should have been paid during the time of the automatic supersedeas also follows from the supersedeas' invalidity. Resumption of benefits and an award of back benefits with interest serve to put the parties in the position they would have been in but for the invalid invocation of the automatic supersedeas.

The accompanying Order, then, grants plaintiffs' petition for relief on the litigated issue and awards immediate resumption of benefits and back benefits to claimants subject to the automatic supersedeas after February 1, 1984.

Final Opinion and Order.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 76-429.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, and CHARLES SAMUEL Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORPORATION, and all other insurance carriers and/or self-insured employers similarly situated,

Defendants.

Filed July 30, 1984; MICHAEL E. KUNZ, Clerk.
By (Illegible) Dep. Clerk.

Before: ADAMS, *Circuit Judge,**
GREEN and POLLAK, *District Judges.*

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* Honorable Arlin M. Adams, United States Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

ORDER

For the reasons stated in the accompanying Opinion:

1. The consent decree filed in this action on April 27, 1984, as amended by Order of May 14, 1984, is hereby APPROVED pursuant to Federal Rule of Civil Procedure 23(e).

2. Any invocation on or after February 2, 1984, of the automatic supersedeas provision of section 413(a) of the Pennsylvania Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1983)(first sentence), is hereby DECLARED to have deprived the compensation claimant involved of his or her property without due process of law.

3. Each named and class defendant insurance carrier and self-insured employer is hereby directed, within thirty (30) days of the date of this Order, to reinstate and resume the payment of all worker's compensation benefits to each member of the plaintiff class who: (a) has had his or her benefits terminated under the automatic supersedeas provision of section 413 on or after February 2, 1984, and (b) has not yet received a decision from a referee on the merits of the underlying termination petition.

4. The payments to be made under paragraph 3 shall include:

(a) all previously withheld compensation retroactive to the date of termination, provided, however, that no payments are required for any period(s) during which claimants are shown to have actually returned to work at wages equal to or greater than the wages they earned at the time of their compensable injury;

(b) statutory interest of 10% on all unpaid compensation as provided by section 406.1 of the Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, §717.1 (Purdon Supp. 1983);

(c) resumed compensation payments, to be paid pending a decision by a referee on the merits of the termination petition, based on the weekly rate in effect at the time of termination; and

(d) the payment of all previously incurred medical expenses and medical expenses incurred prior to a decision by a referee on the merits of the termination petition, such payments to be made regardless of whether the claimant has returned to work.

ARLIN M. ADAMS
ADAMS, *Circuit Judge*

CLIFFORD SCOTT GREEN
GREEN, *District Judge*

LOUIS H. POLLAK, AMA
POLLAK, *District Judge*

JULY 30, 1984
7/31/84 copies to:
See attached

Order (Amendment)

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 76-429.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, and CHARLES SAMUEL Individually and on behalf of all others similarly situated,

Plaintiffs,

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PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORPORATION, and all other insurance carriers and/or self-insured employers similarly situated,

Defendants.

Filed August 13, 1984; MICHAEL E. KUNZ, Clerk.
By (Illegible) Dep. Clerk.

Before: ADAMS, *Circuit Judge,**
GREEN and POLLAK, *District Judges.*

* Honorable Arlin M. Adams, United States Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

Order (Amendment).

ORDER

On July 30, 1984, we issued an unsigned Opinion and an accompanying Order approving and adopting the named parties' proposed consent decree. That Opinion and Order also resolved the issues which the named parties had been unable amicably to resolve among themselves.

Counsel have brought to our attention that we mischaracterized paragraph 14 of the consent decree on page 23 of our Opinion. The third sentence of the first full paragraph on page 23 reads:

> Paragraph 14 further provides that in the event that no hearing is scheduled within sixty days, or in the event that the referee does not render his decision on the special supersedeas within sixty-seven days of the entry of this court's Order, then the claimant will receive automatic resumption of future benefits and automatic back benefits.

In fact, paragraph 14 provides, in pertinent part, that

> [i]f no decision has been rendered by the referee assigned the Special Supersedeas Hearing by the seventh day following the expiration of the prescribed sixty (60) day period, then the payment of compensation benefits shall be resumed *only prospectively* commencing the day following the expiration of the foregoing sixty-seven (67) day period. . . .

Consent Decree ¶14 (emphasis added).

Order (Amendment).

For the foregoing reason, the third sentence of the first full paragraph on page 23 of our July 30 Opinion is AMENDED by striking the last four words of that sentence. The amended sentence SHALL now read:

> Paragraph 14 further provides that in the event that no hearing is scheduled within sixty days, or in the event that the referee does not render his decision on the special supersedeas within sixty-seven days of the entry of this court's Order, then the claimant will receive automatic resumption of future benefits.

ARLIN M. ADAMS
ADAMS, *Circuit Judge*

CLIFFORD SCOTT GREEN
GREEN, *District Judge*

LOUIS H. POLLAK
POLLAK, *District Judge*

AUGUST 8, 1984
8/13/84 copies to:
See attached

Opinion on Merits and Order for Submissions

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 76-429.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, and CHARLES SAMUEL Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORPORATION, and all other insurance carriers and/or self-insured employers similarly situated,

Defendants.

Filed February 1, 1984; MICHAEL E. KUNZ, Clerk.
By (Illegible) Dep. Clerk.

Before: ADAMS, *Circuit Judge,** GREEN and POLLAK, *District Judges.*

* Honorable Arlin M. Adams, United States Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

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Opinion on Merits and Order for Submissions.

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OPINION

POLLAK, District Judge February 1, 1984

I.

Plaintiffs initiated this action in 1976, challenging the constitutionality of certain provisions of the Pennsylvania Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, §§1-1031 (Purdon 1952 and Supp. 1982). In particular, plaintiffs allege that the "automatic supersedeas" provision of section 413 of the Act, Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1982), permits employers and insurers to terminate worker's compensation benefits without according due process of law to those whose benefits are terminated, in violation of the Fourteenth Amendment. The automatic supersedeas terminates benefits without notice to the person receiving benefits. It requires only an employer's or insurer's petition reciting that the benefit recipient has returned to work at the same or higher pay or a petition accompanied by a physician's affidavit averring that the recipient has recovered. Plaintiffs make their due process claim in an action under the Civil Rights Act of 1871, 42 U.S.C. §1983 (Supp. V 1981).

Opinion on Merits and Order for Submissions.

A decade ago a three-judge panel of this court heard a challenge to section 413's predecessor. In *Silas v. Smith*, 361 F. Supp. 1187 (E.D. Pa. 1973), the court considered the case of an individual whose worker's compensation benefits were terminated by his employer's insurer under the automatic supersedeas provision then in effect. The court found no state action in this termination. The court further stated that even had it found state action, it would not have found a violation of the due process clause. The *Silas* court, however, faced these questions at a time when employers and employees could opt out of the Pennsylvania Workmen's Compensation Act. Further, the *Silas* court was not called on to consider the problem of the automatic supersedeas' application to public employees or to employees of employers insured by the State Workmen's Insurance Fund, an insurer administered by state officials. Therefore, as we explain more fully below, the ruling in *Silas* is not controlling with respect to the claims advanced in the lawsuit now before the court. Because the prior decision in *Silas* is not controlling here, it was proper that, after this action was commenced, Judge Fogel ordered that "a three-judge court be convened ... in that, pursuant to 28 U.S.C. §§2281 and 2284, the complaint raises substantial constitutional issues and requests as relief the enjoining of the enforcement, operation and execution of a state statute."[1]

[1] Congress has repealed section 2281, Pub.L. No. 94-381, §§1, 2, 90 Stat. 1119 (1976), but section 2281 still applies to cases filed before the repeal.

Opinion on Merits and Order for Submissions.

On March 27, 1978, an order was entered permitting this case to proceed as a plaintiffs' and defendants' class action under Fed. R. Civ. P. 23(b)(2). The Plaintiff class includes "all persons who have been or will be receiving benefits pursuant to the Pennsylvania Workmen's Compensation Act and who have had or will have such benefits terminated, suspended, reduced or otherwise deprived without advance notice and opportunity for a prior evidentiary hearing." The defendant class includes "all insurance companies, mutual associations and employment establishments authorized to insure the payment of Pennsylvania Workmen's Compensation benefits who have acted, or will act, to terminate, suspend, reduce, or otherwise deprive benefits to previously eligible claimants without advance notice and opportunity for a prior evidentiary hearing . . . ."

Discovery proceeded for five years. Then, after a series of conferences, the court ordered the parties to submit a set of stipulations during the summer of 1982. Plaintiffs presented their evidence by way of stipulations and affidavits in November. Defendants then moved for involuntary dismissal pursuant to Fed. R. Civ. P. 41(b). This court heard oral argument on April 7, 1983. At that time, we deferred decision on the 41(b) motion until defendants' evidence had been submitted. Defendants then put in their evidence by stipulations and affidavits. Because plaintiffs offered no rebuttal evidence, the entire case was before us for decision on the merits. This opinion constitutes our findings of fact and conclusions of law.

II.

This case involves a challenge to one of the methods by which an employer or insurer obligated to pay benefits under the Pennsylvania Workmen's Compensation Act can cease paying those benefits. Through a set of procedures not pertinent to this action, an individual covered by the Act and injured in the course of his employment can obtain the right to receive weekly benefits payments from his employer. The employer must insure against this obligation. Pa. Stat. Ann. tit. 77, §501 (Purdon Supp. 1982); Stipulations of Fact ¶16. This requirement may be satisfied in one of three ways: (1) the employer may retain a private insurance carrier licensed to provide worker's compensation insurance; (2) the employer may insure through the State Workmen's Insurance Fund, an insurance fund administered by the state; (3) the employer may self-insure. *Id.* When an employer purchases insurance, the insurer assumes all of the employer's liabilities under the Act and, in effect, stands in the employer's shoes with respect to the employees receiving worker's compensation. *See* Pa. Stat. Ann. tit. 77, §§501, 701 (Purdon Supp. 1982); *Cease v. Thomas*, 155 Pa. Super. 215, 38 A.2d 547 (1944). Thus, in the ordinary case of an insured employer, the employer has little to do with a compensation matter once the insurer has begun to pay compensation benefits.

When a self-insured employer or an insurer believes that an injured employee who receives compensation benefits has resumed work or recovered his or her health, the employer or insurer will typically seek to terminate the employee's worker's compensation benefits. If the employee does not agree to a termination of his benefits,

the employer or insurer files a petition to terminate or modify the compensation with the agency which administers the worker's compensation program, the Bureau of Worker's Compensation. Pa. Stat. Ann. tit. 77, §772 (Purdon Supp. 1982). A referee from the Bureau then holds hearings to determine whether grounds for termination or modification exist.

Section 413 of the Act, the subject of this lawsuit, deals with the right to compensation between the time an employer or insurer petitions for termination or modification and the time the referee makes a final determination. Section 413, in pertinent part, provides:

> The filing of a petition to terminate or modify a notice of compensation payable or a compensation agreement or award as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require only when such petition alleges that the employe has returned to work at his prior or increased earnings or where the petition alleges that the employe has fully recovered and is accompanied by an affidavit of a physician on a form prescribed by the [Bureau of Worker's Compensation] to that effect which is based upon an examination made within fifteen days of the filing of the petition. In any other case, a petition to terminate or modify a compensation agreement or other payment arrangement or award as provided in this section shall not automatically operate as a supersedeas but may be designated as a request for a supersedeas, which may then be

> granted at the discretion of the referee hearing the case.

Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1982).

Thus, in two sorts of cases an employee receiving benefits can have his benefits terminated pending disposition of his employer's or his employer's insurer's petition to terminate or modify those benefits. The first sort of case is one where the petition alleges that the employee has returned to work at the same or higher wages. The second sort of case is one where the petition alleges that the employee has fully recovered from his disability and the petition is accompanied by a doctor's affidavit averring recovery based upon an examination of the employee within the previous fifteen days.

In either of the two automatic supersedeas situations, the filing of the petition suspends the employer's or insurer's obligation forthwith. Before the employer or insurer can successfully file the petition, however, clerical personnel of the Bureau promptly review the petition

> to determine whether [it has] been properly completed and [complies] in form with the requirements of the [Act] and the Bureau's own rules and regulations. If any deficiency as to form is found, the bureau rejects the petition and returns it, with notice of the nature of any defect, for correction by the party.

Stipulations of Fact ¶51. This review is addressed to formal issues and involves no consideration of the merits of the petition. Stipulations of Fact ¶52.

The filing employer or insurer need not serve the employee with a copy of the petition either before or

after filing. Instead, the Bureau sends the employee notice of the petition, after filing, at the time (usually no more than five days after receipt of the petition) that the Bureau assigns the matter to a referee. Stipulations of Fact ¶¶53, 54.

The employee has no avenue to contest application of the automatic supersedeas other than his defense on the merits of the petition before the referee. Referees typically take one year or more to decide contested cases. Stipulations of Fact ¶63. Even if he ultimately has his benefits restored retroactively, an employee subject to an automatic supersedeas will find himself without worker's compensation benefits from the time that the Bureau of Worker's Compensation performs its clerical review of his employer's or insurer's petition until the time a referee decides the case. Plaintiffs contend that this constitutes a deprivation of that employee's property interest in his compensation benefits without according the employee due process of law.

We have permitted this action to proceed as both a plaintiffs' and defendants' class action. The plaintiff class includes those as to whom the automatic supersedeas provision has been or may be invoked. The defendant class includes all those who have invoked or may invoke the automatic supersedeas. Delimitation of these classes requires explanation of the Workmen's Compensation Act's coverage.

The Act covers all "employees" of "employers." An "employee" is defined as any non-casual worker who performs service for another under the other's control. Pa. Stat. Ann. tit. 77, §22 (Purdon Supp. 1982). The Act excludes elected officers of the state or any of its

political subdivisions, *id.*, and domestic workers, Pa. Stat. Ann. tit. 77, §676 (Purdon Supp. 1982). "Employers" include "natural persons, partnerships, joint-stock companies, corporations for profit, corporations not for profit, municipal corporations, the Commonwealth, and all governmental agencies created by it." Pa. Stat. Ann. tit. 77, §21 (Purdon 1952). The Act does not cover federal workers.

> To the extent it applies, the [Act] covers all injuries or occupational diseases occurring in Pennsylvania, regardless of the place of hire. The Act also applies to injuries incurred outside of the Commonwealth where the employee is: (1) principally employed in Pennsylvania; (2) hired in Pennsylvania with employment not principally localized in any state; (3) hired in Pennsylvania with employment principally localized in another state which does not cover that injury in its own workers' compensation law; or (4) hired in Pennsylvania for employment outside the United States or Canada.

Stipulations of Fact ¶5.

Before 1974, employees and employers had the option of declining coverage under the Act. Employers and employees were presumed to accept application of the Act. They could, however, file a notice with the Bureau and avoid the Act's application to their employment relationship. Pa. Stat. Ann. tit. 77, §§461, 462 (Purdon 1952) (repealed). The Pennsylvania Legislature has since made the statute mandatory. Act No. 263, §5, 1974 Pa. Laws 782, 784, *codified at* Pa. Stat. Ann. tit. 77, §461 (Purdon Supp. 1982). Thus, all possible class members are in fact class members in this action.

This case now has four remaining individual plaintiffs who represent the class. Richard Baksalary[2] injured his left achilles tendon while working for the Midvale-Heppenstall Company. Midvale-Heppenstall had insured with the Pennsylvania Manufacturers' Association Insurance Company ("PMAIC") which paid compensation benefits to Mr. Baksalary from December 27, 1973, until June 12, 1974. On the basis of a June 11 examination by one Dr. Cassidy, PMAIC filed a first petition for termination of Mr. Baksalary's compensation benefits on July 19, 1974, invoking the automatic supersedeas. On August 2, however, PMAIC again began to pay Mr. Baksalary's benefits. Then, on October 25, PMAIC again reversed its field, and stopped paying Mr. Baksalary. On November 22, PMAIC filed a second petition for termination alleging that Mr. Baksalary had recovered as of June 11. PMAIC attached an affidavit of Dr. Cassidy and again invoked the automatic supersedeas. Mr. Baksalary first received notice of the November 22 filing on December 4. Three years later, on December 1, 1977, a referee determined that PMAIC had been on sound ground in discontinuing the payment of benefits to Mr. Baksalary but that it still remained liable for any treatment costs related to Mr. Baksalary's injury, subject to a credit for benefit payments made after June 11, 1974.

Plaintiff William Jones[3] suffered an injury while employed as a truck driver for the Tri-County Hauling Company. American Mutual Liability Insurance Company insured Tri-County against worker's

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[2] We base this account upon the parties' Stipulations Concerning Plaintiff Richard Baksalary and Defendant Pennsylvania Manufacturers' Association Insurance Company.

[3] We base this account on the Stipulations Concerning Plaintiff William Jones and defendant American Mutual Liability Insurance Company.

compensation liability. Mr. Jones and American Mutual entered an agreement for payment of compensation benefits beginning on December 5, 1973. American Mutual stopped paying benefits on May 5, 1974, and filed a petition to terminate Mr. Jones' benefits on June 11. Based upon a physician's affidavit that an examination of May 29 showed Mr. Jones' recovery, American Mutual invoked the automatic supersedeas at the time of its June 11 petition. The Bureau of Worker's Compensation mailed notice of Mr. Jones' termination on June 16. Three years later, on August 11, 1977, a referee found that Mr. Jones had not recovered in May of 1974, and ordered American Mutual to pay retroactive benefits to Mr. Jones with interest at ten percent per annum.

Morris Tucker[4] injured his back while packing meat for S. Lotman & Sons, Inc. Bituminous Casualty Corporation insured Lotman. Bituminous and Mr. Tucker agreed that Bituminous owed Mr. Tucker compensation payments beginning November 9, 1973. On July 17, 1974, Bituminous filed a petition to terminate Mr. Tucker's benefits and invoked the automatic supersedeas. Bituminous had not attached a physician's affidavit, but had typewritten on the petition that "J. David Hoffman, M.D. certifies that Morris T. Tucker was able to return to work on July 3, 1974." This apparently sufficed, because Bituminous paid nothing to Mr. Tucker until a referee issued a decision on August 21, 1975, in favor of Mr. Tucker. Bituminous appealed that decision, but the parties settled on December 19,

[4] We take this account from the Stipulations Concerning Plaintiff Morris Tucker and Defendant Bituminous Casualty Corporation.

1977. During the period of his termination, Mr. Tucker received income from welfare, Social Security Disability Insurance, and his wife's employment.

Charles Samuel had two experiences with the automatic supersedeas provision of section 413.[5] Mr. Samuel worked for the Pennsylvania Liquor Control Board when he hurt his back. The State Workmen's Insurance Fund ("SWIF") insured the Liquor Control Board. As described more fully in section III(B)(2)(b) of our opinion, "S.W.I.F. is a legislatively created and state-operated insurance carrier from which workers' compensation insurance policies may be purchased by employers to cover all risks of liability under the Act, including employers who have been rejected or cancelled by private insurance carriers." Stipulations of Fact ¶22.

SWIF began paying compensation to Mr. Samuel as of February 28, 1975. SWIF first terminated these payments on October 7, 1975, on the basis of an examination of Mr. Samuel by Dr. Williams. SWIF petitioned to terminate Mr. Samuel's compensation on October 17 and invoked the automatic supersedeas. The first notice that Mr. Samuel received of the petition was a copy mailed to him by the Bureau on November 7. A referee denied SWIF's petition and awarded retroactive compensation benefits with interest almost eleven months later, on September 20, 1976.

On June 27, 1977, SWIF again filed a petition to terminate Mr. Samuel's benefits. SWIF attached the affidavit of Dr. Stiffel, who had conducted an examination on June 21, and SWIF invoked the automatic supersedeas. A copy of this petition was

[5] *See* Stipulations Concerning Plaintiff Charles Samuel and Defendant S.W.I.F.

mailed to Mr. Samuel on July 1. A referee denied SWIF's petition on January 5, 1978, and SWIF appealed. SWIF did not resume payments until the administrative appeal board remanded the case to the referee on April 10, 1978. The referee clarified his January 5, 1978, order on March 19, 1979, to award Mr. Samuel retroactive benefits and ten percent per annum interest.

III.

A claim under section 1983 alleging a violation of the due process clause of the Fourteenth Amendment requires proof of three elements. First, a section 1983 claimant must show a deprivation of a constitutionally protected liberty or property interest. Second, the claimant must show that the deprivation was accomplished "under color of state law" and as a result of "state action;" these turn out to mean the same thing. Third, the claimant must show that the method by which the deprivation was effectuated involved a denial of due process—in this case, procedural due process. We proceed to consider each of these elements in turn.

A. *Deprivation*

As we discussed in the previous portion of this opinion, section 413 permits an employer or insurer summarily to suspend worker's compensation payments to an injured employee formerly entitled to those benefits. The employee may protest this suspension and he may obtain a hearing before a referee. The referee may, of course, determine that the employee was no

longer entitled to benefits at the time of the petition.[6]

[6] The parties devoted considerable effort to establishing the rate at which referees find for employees when the employee contests a termination petition involving an automatic supersedeas. It is to be noted that the employee cannot effectively challenge the supersedeas itself. Rather, the employee contests the underlying petition to terminate; the supersedeas operates in the interim.

Plaintiffs commissioned two statistical studies, one in 1978 and one in 1981. Stipulations of Fact ¶102. Plaintiffs now rely only on the 1981 report by Professor Bernard Siskin of the Temple University Statistics Department. *See* Stipulated Exhibit 58 (Supplemental Statistical Study of the Automatic Supersedeas Process Under the Pennsylvania Worker's Compensation Act). Based on a sample of 211 files, Professor Siskin calculates the "reversal" rate—the rate of referee awards more favorable to employees than complete termination—at 41.7% of all contested automatic supersedeas cases. Professor Siskin's calculations also suggest a much higher "reversal" rate when the employee has legal representation: Professor Siskin estimates a "reversal" rate of 77.9% where the employee is represented, but of only 24.6% where the employee has no lawyer.

Defendants dispute Professor Siskin's study. *See* Stipulations of Fact ¶¶117-121. Defendants employed Mr. Lester V. Jackson, a former director of claims operations for PMAIC, to critique Professor Siskin's analysis. *See* Stipulations of Fact ¶¶110-116; Defendant's Exhibit D-5 (Survey and Study Report Submitted by L. V. Jackson). Mr. Jackson concludes that Professor Siskin's data only support a finding that referees decide unfavorably to employers or insurers in 9% of contested automatic supersedeas cases. Exhibit D-5, p. 8. Professor Siskin's statistical tests allow him to be 99% confident that the actual "reversal" rate substantially exceeds 9%. Stipulated Exhibit 58, p. 5. Mr. Jackson's disagreement with Professor Siskin comes not from an assertedly superior statistical analysis. Rather, Mr. Jackson and Professor Siskin disagree on the proper classification of cases and outcomes; Professor Siskin counts some results as employee "wins" which Mr. Jackson counts as favorable to the insurer. *See* Stipulations of Fact ¶¶117-120.

We do not need to resolve the technical issues involved in the parties' statistical dispute. The undisputed data show that (1) in contested automatic supersedeas terminations it is not a rarity for

(Footnote continued on following page.)

However, the referee may find that the employee had a continuing disability or that he had not returned to work. This finding would dictate a decision that the employer or insurer should not have terminated the employee's benefits. In that case, the referee will award the payment of retroactive benefits under Pa. Stat. Ann. tit. 77, §772 (Purdon Supp. 1982). Referees, though, typically take one year or more to decide a case. Stipulations of Fact ¶63.

We find that when an individual must forego the use of his compensation benefits for as long as one year, even if he receives reimbursement at the end of that period,[7] that individual has undergone the deprivation of a

(Footnote continued from preceding page.)

the referee ultimately to determine that the employee is entitled to an award more favorable than the complete termination of benefits authorized by section 413, and (2) the time-lag between automatic termination and the referee's curative award averages one year. We conclude that the interim deprivation of enjoyment of benefits to which a worker has a statutory entitlement occurs frequently enough and lasts long enough to rise to a level of constitutional significance.

[7] Section 406.1 of the Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, §717.1 (Purdon Supp. 1982), requires payment of interest at ten percent per annum by employers or insurers "on all due and unpaid compensation . . . ." By its terms this section arguably applies only to delay in providing initial compensation payments after an employee claims a right to benefits. The parties have not stipulated that section 406.1 applies to awards of retroactive benefits upon an unsuccessful petition to terminate invoking the automatic supersedeas. Similarly, we have found no court which has held section 406.1 applicable. However, referees in the cases of two of the named plaintiffs did award interest at the rate of ten percent per annum on retroactive benefits awards. *See* Stipulations Concerning Plaintiff William Jones and Defendant American Mutual Liability Insurance Company ¶24; Stipulations Concerning Plaintiff Charles Samuel and Defendant S.W.I.F. ¶36. We therefore assume that section 406.1 applies here.

constitutionally protected property interest. During the period of termination, he has lost significant income. He will find this income difficult to replace through borrowing in the market because he has no way of convincing a lender that a referee will eventually award benefits to him; most lenders are likely to assume otherwise. In a similar case involving termination of Social Security Disability Insurance benefits pending a final hearing, the Supreme Court stated that it "has been implicit in our prior decisions . . . that the interest of an individual in continued receipt of these benefits is a statutorily created 'property' interest protected by the Fifth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (citations omitted).[8] We see no distinction for this purpose between the federal disability benefits at issue in *Mathews* and the state disability benefits at issue in this case.[9]

[8] One should note that in *Mathews* a terminated benefits recipient who showed a continuing disability could recover back benefits. 424 U.S. at 339. Even so, "Eldridge . . . raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments." 424 U.S. at 331.

[9] The automatic supersedeas terminates an employee's benefits. Some individuals subject to the automatic supersedeas should not have their benefits "terminated," but rather "suspended." An individual with "suspended" benefits does not receive regular checks. However, if such an individual incurs any medical expenses attributable to his work-related injury, he can receive reimbursement from his employer or his employer's insurer. Stipulations of Fact ¶46(c). An individual subject to the automatic supersedeas who has returned to work at a higher wage may still have continuing medical problems associated with his injury. He cannot receive the medical benefits to which the statute entitles him because of the automatic supersedeas. This may alter the pattern of medical treatment which he can obtain. This alteration would constitute a deprivation not recompensable by a subsequent award of retroactive benefits and interest.

B. *State Action*

The Civil Rights Act of 1871 creates a private right of action against

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . .

42 U.S.C. §1983 (Supp. V 1981). Plaintiffs here complain that the automatic supersedeas fails to accord them their constitutional right to due process before depriving them of their property interest. Because the Fourteenth Amendment creates this due process right, the right only runs against a "state." Thus, plaintiffs must show a deprivation by defendants which satisfies both section 1983's "under color of state law" requirement and the Fourteenth Amendment's "state action" requirement. The Supreme Court has stated, however, that "[i]f the challenged conduct . . . constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under §1983." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982); *accord Jackson v. Temple University*, 721 F.2d 931, 932-933 (3d Cir. 1983); *Community Medical Center v. Emergency Medical Services*, 712 F.2d 878, 879 n. 3 (3d Cir. 1983). We therefore need only embark on one unified inquiry for purposes of the due process clause and section 1983.

Our primary guidance in that inquiry comes from three recent Supreme Court opinions. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982);[10] *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982);[11] *Blum v. Yaretsky*, 457 U.S. 991 (1982).[12] Since the Supreme Court's state action trilogy, the Court of Appeals for the Third Circuit has given

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[10] *Lugar* involved a challenge to a Virginia prejudgment attachment statute.

> The prejudgment attachment procedure required only that respondents allege, in an *ex parte* petition, a belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors. Acting upon that petition, a clerk of the state court issued a writ of attachment, which was then executed by the county sheriff.

457 U.S. at 924. The Court found sufficient state involvement in this process to make the private creditor's attachment under the Virginia statute state action.

[11] *Rendell-Baker* involved a teacher's suit against her former employer. The former employer, a school for maladjusted high-school students, received virtually all its income from tuition paid by state or local governmental authorities. Under the pertinent Massachusetts statute, these state and local authorities had an obligation to provide special education through private schools where public schools were not equipped to provide such education. The Court found insufficient relationship between the government authorities and the school to make termination of the teacher state action.

[12] In *Blum* the Court considered a challenge to procedures by which New York nursing homes determined whether to transfer Medicaid patients from higher-care to lower-care facilities. Even though (a) most such institutions received large amounts of state funding, (b) the state regulated the institutions carefully, and (c) the state typically adjusted patients' Medicaid benefits on the basis of the nursing homes' transfer decisions, the Court found no state action.

some further guidance [13] on the issue of state action. *See*

[13] Plaintiffs have suggested in another context that decisions of our court of appeals do not bind us when we sit as a three-judge district court; plaintiffs suggest that we need only follow decisions of the Supreme Court, the court to which appeal lies. Plaintiffs' Memorandum of Law at 11. The argument draws support from a suggestion, albeit not a flat contention, to that effect advanced by Professor Moore. *See* 1B J. Moore, Moore's Federal Practice ¶0.402[1] n. 17 (2d Ed. 1983); *see also Confederated Tribes of Colville v. Washington*, 446 F. Supp. 1339, 1356 n. 16 (E.D. Wash. 1978) (three-judge court declining to decide the question but adverting to the issue).

Both Professor Moore and *Confederated Tribes* cite the following phrase from *Jehovah's Witnesses in Washington v. King County Hospital*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd mem.*, 390 U.S. 598 (1968): "In this special three-judge court case we are not bound by any judicial decisions other than those of the United States Supreme Court." 278 F. Supp. at 504-505. The *Jehovah's Witnesses* court, however, used this statement to introduce a discussion of state court precedents on a question of federal law. Further, the state court precedents supported the district court's conclusion. We have found no case support other than *Jehovah's Witnesses* for the proposition that a three-judge court need not follow its court of appeals. In fact, we have found considerable authority to the contrary. *See Finch v. Mississippi State Medical Ass'n, Inc.*, 585 F.2d 765, 773 (2d Cir. 1978) ("the three-judge court was required to analyze carefully [a court of appeals decision] because, as a district court within the Second Circuit, it was bound to follow the law of the circuit"); *Lewis v. Rockefeller*, 431 F.2d 368, 371 (2d Cir. 1970) (no reason to convene three-judge court when decision of court of appeals in prior case determines issue); *Russell v. Hathaway*, 423 F. Supp. 833, 835 (N.D. Tex. 1976) (three-judge court analyzing reasons for following the court of appeals); *Hopson v. Schilling*, 418 F. Supp. 1223, 1234-1235 n. 15 (N.D. Ind. 1976) (a three-judge court would be bound by court of appeals opinion on point, so not necessary to convene three-judge panel); *Athanson v. Grasso*, 411 F. Supp. 1153, 1157 (D. Conn. 1976) ("As a district court, although composed of three judges, we are required to follow the law of our own circuit insofar as it is pertinent."). For discussion of earlier precedent on the question, see *Alabama NAACP State Conference of Branches v. Wallace*, 269 F. Supp. 346, 350 (M.D. Ala. 1967) (three-judge court). We therefore feel ourselves bound not only by pertinent decisions of the Supreme Court, but also by pertinent decisions of the Court of Appeals for the Third Circuit.

Jackson v. Temple University, 721 F.2d 931 (3d Cir. 1983);[14] *Nguyen v. United States Catholic Conference*, 719 F.2d 52 (3d Cir. 1983);[15] *Community Medical Center*

[14] In *Jackson*, plaintiff, after his termination, sued his union and his former employer under section 1983 and under the National Labor Relations Act. Jackson contended that the union had improperly failed to press his grievance to arbitration. The Court of Appeals found no state action in the union's actions. The court accepted the district court's assumption *arguendo* that an action by Temple University constituted state action and proceeded to determine that the University had deprived Jackson of no rights.

In this context we feel it appropriate to point out that one member of this panel has recently held that, because of Temple University's "state related" status (involving substantial state funding and appointment of one-third of the trustees by high state officials), Temple has a "symbiotic relationship" with Pennsylvania sufficient under *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), to make all Temple's actions "state action." *Schier v. Temple University*, Civil Action No. 82-3554 (E.D. Pa. Dec. 8, 1983) (bench opinion per Pollak, J.); *accord Isaacs v. Board of Trustees of Temple University*, 385 F. Supp. 473 (E.D. Pa. 1974). The decisions in *Schier* and *Isaacs* are harmonious with the decision of our Court of Appeals in 1977 that actions of the University of Pittsburgh, another "state related" institution, are "state action." *Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977). But the Court of Appeals will soon reconsider the constitutional status of the University of Pittsburgh, since a district court has recently determined that the Court of Appeals' *Braden* analysis of the University of Pittsburgh's relationship with the Commonwealth has been undercut by the Supreme Court's decisions in *Lugar*, *Rendell-Baker*, and *Blum*. *Krynicky v. University of Pittsburgh*, 560 F. Supp. 803 (W.D. Pa. 1983), *appeal docketed*, No. 83-5471 (3d Cir. 1983). We mention these matters to make clear that the instant opinion, which does not rest on a *Burton* state-action analysis, reflects no view by the members of this court on the problem shortly to be addressed by the Court of Appeals in *Krynicky*.

[15] *Nguyen* involved a claim that the United States Catholic Conference violated the Fifth Amendment in its distribution of benefits to Indochinese refugees. Although the federal government reimbursed some benefits under the Indochina Migration and Refugee Assistance Act of 1975 through a contractual relationship with the Catholic Conference, the Court of Appeals found no state action.

v. Emergency Medical Services, 712 F.2d 878 (3d Cir. 1983).[16]

Lugar has particular relevance to this case. In *Lugar* the Court refined the "close nexus" analysis propounded in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The *Lugar* court divided state-action analysis into two parts:

> First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

457 U.S. at 937. We begin our analysis of state action by considering *Lugar*'s first prong. We then move on to the more difficult question whether employers and insurers who invoke section 413's automatic supersedeas "may fairly be said to be...state actors[s]."

(1) *State-created right or privilege*

An employer or insurer who believes that an employee receiving worker's compensation benefits has completely recovered or has returned to work at the same or higher pay must nevertheless continue to pay compensation benefits unless the employer or insurer qualifies for a

[16] In *Community Medical Center* the plaintiff challenged designation of another hospital as the "resource hospital" for the Scranton area. Defendant, a private non-profit corporation, existed to contract with the state and federal governments as a "lead agency" under several grants programs. Nevertheless, the Court of Appeals found no state action under any of several theories.

supersedeas under section 413. In order to qualify for an automatic supersedeas, the employer or insurer must file a petition with the Bureau of Worker's Compensation (a) accompanied by the affidavit of a doctor averring complete recovery or (b) reciting that the employee has returned to work at a wage at least equalling his prior wage. If an employer or insurer suspends compensation payments without qualifying for this automatic supersedeas and without a referee's adjudication, the employer or insurer becomes liable for penalties of ten, or even twenty, percent of the withheld payments. Pa. Stat. Ann. tit. 77, §774.1 (Purdon Supp. 1982).

Termination through invocation of the automatic supersedeas provision, then, constitutes "the exercise of some right or privilege created by the state." In that sense, this case resembles *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); in both cases the deprivation requires a special filing process specifically created by the state.

The automatic supersedeas provision does not merely codify the ordinary way of doing things, as the Court characterized section 7-210 of the New York Uniform Commercial Code in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978). Section 7-210 allowed a warehouseman to sell goods in his possession to satisfy his lien, remitting the owner of the goods to asserting in a subsequent lawsuit any claim that the warehouseman had no proper lien. The Court rejected a claim that section 7-210 was unconstitutional in authorizing a transfer of the owner's goods to a third person without a hearing. The Court reasoned that the challenged application of section 7-210 involved no state action because, among other things, section 7-210 did not

substantially change the state's relation to the transaction.[17] By contrast, absent the automatic supersedeas provision, an employer or insurer could not terminate an individual's benefits without a referee's adjudication. If the employer or insurer did so terminate, the Workmen's Compensation Act would not only award damages, but would also impose penalities.

(2) *State Actor*

Having found that section 413 satisfies *Lugar*'s first prong, we now turn to the second requirement that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." 457 U.S. at 937. In analyzing this requirement, we have found it useful to distinguish four sorts of employers and insurers who may invoke the automatic supersedeas provision of section 413.

First, we consider the government as an employer. The Act covers employees of the Commonwealth and of local governmental entities by virtue of Pa. Stat. Ann. tit. 77, §21 (Purdon 1952), which defines "employer" to include

[17] In our discussion of *Flagg Brothers* here, we have somewhat anachronistically assumed that the *Flagg Brothers* opinion applied *Lugar*'s two-pronged state-action analysis. The Court, of course, had not yet expressly formulated this analysis in 1978. Therefore, the *Flagg Brothers* opinion does not expressly hold that the U.C.C. involved no state-created right or privilege. We read the *Flagg Brothers* result as resting on this first prong of the *Lugar* analysis. Because the Court in *Flagg Brothers* did not expressly consider as separate the issues of whether a state-created right or privilege existed and whether the person responsible for the deprivation could fairly be said to be a state actor, one could instead read *Flagg Brothers* as holding that the warehouseman was not a state actor, even though the warehouseman employed a state-created right or privilege. We prefer the first reading.

"the Commonwealth, and all governmental agencies created by it." Public employers may choose not to insure against their worker's compensation liability under the Act. For example, counsel represented to us at argument that the Pennsylvania Turnpike Commission self-insures. Tr. of Oral Arg. at 23. Thus, in section III(B)(2)(a) of this opinion, we consider whether self-insuring public employers are state actors.

Most public employers, however, insure through the State Workmen's Insurance Fund ("SWIF"), an insurer administered by the State Workmen's Insurance Board. *See* Pa. Stat. Ann. tit. 77, §221 (Purdon Supp. 1982). Section III(B)(2)(b) of this opinion considers whether SWIF is a state actor when it invokes the automatic supersedeas provision on behalf of a public employer.

Private employers can also insure through SWIF. Section III(B)(2)(c) of this opinion considers whether SWIF is a state actor when it invokes section 413 on behalf of a private employer.

Finally, section III(B)(2)(d) considers whether a private insurer or a self-insuring private employer is a state actor when it invokes the automatic supersedeas provision.

(a) *Self-Insured Public Employers*

State action exists when a self-insured public employer invokes section 413's automatic supersedeas procedure. By inquiring whether a state-created procedure involving a state actor worked a particular deprivation, *Lugar*'s two-pronged test seeks to identify that conduct "fairly attributable to the state." 457 U.S. at 937; *accord Rendell-Baker v. Kohn*, 457 U.S. at 838; *Blum v.*

Yaretsky, 457 U.S. at 1004 ("The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct . . . ."); *Nguyen v. United States Catholic Conference*, 719 F.2d 52, 54 (3d Cir. 1983); *Community Medical Center v. Emergency Medical Services*, 712 F.2d 878, 879 (3d Cir. 1983). However, the two aspects of the test "collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the state to his decisions." *Lugar*, 457 U.S. at 937. Thus, when a state agency or a local government invokes section 413 against one of its employees, the state is the actor.

(b) *Public Employers Insured by SWIF*

The analysis becomes slightly more complicated when a public employer insures through SWIF. (Under Pennsylvania practice, the insurer, and not the employer, becomes the party responsible for payment of compensation benefits, *see Cease v. Thomas*, 155 Pa. Super. 215, 38 A.2d 547 (1944), and thus the insurer becomes the party which will actually invoke the automatic supersedeas.

At oral argument, counsel for the Commonwealth defendants seemed to concede that when SWIF acted on behalf of a public employer, state action existed. Tr. of Oral Arg. at 20. We give this concession close consideration because recent precedents cast some doubt on the existence of state action when a government agency "contracts out" its responsibilities. *See Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (education for

disturbed students); *Nguyen v. United States Catholic Conference*, 719 F.2d 52 (3d Cir. 1983) (payment of relief funds to refugees); *cf. White v. Massachusetts Council of Construction Employers*, 103 S. Ct. 1042 (1983) (city which will only hire contractors who themselves hire half their workers from the city does not violate the commerce clause).

The State Workmen's Insurance Fund strongly argues that it is not a state agency and therefore does not have an "official character . . . such as to lend the weight of the state to [its] decisions." *Lugar*, 457 U.S. at 937. We disagree.

SWIF's argument proceeds from the limitation on the state's liability for claims on the fund to the assessments and premiums paid by insured employers. *See* Pa. Stat. Ann. tit. 77, §221 (Purdon Supp. 1982). But that same sentence provides that "[s]uch Fund shall be administered by the [State Workmen's Insurance] Board . . . ." *Id.* The Board consists of the Commissioner of Labor and Industry, the Insurance Commissioner, and the State Treasurer. Pa. Stat. Ann. tit. 77, §211 (Purdon 1952). Further,

> [t]he officers and employes of the State Workmen's Insurance Board created by the act to which this is a supplement shall be deemed and held to be, for all purposes whatsoever, officers and employes of the Commonwealth of Pennsylvania, and shall be entitled to and have and exercise all the rights, powers, and privileges, and be subject to all the duties, restrictions, and penalties, of other officers and employes of the Commonwealth.

Pa. Stat. Ann. tit. 77, §381 (Purdon 1952).

In short, three high state officials, collectively constituting the State Workmen's Insurance Board, have sole supervision of SWIF's administration. Moreover, these officials and their board employees are "for all purposes whatsoever, officers and employees of the Commonwealth of Pennsylvania . . . ." They are subject to all the restrictions of other officers and employees of the Commonwealth. These restrictions include the Fourteenth Amendment. Therefore, we find that when SWIF acts, the state acts. *See Pennsylvania v. Board of Trusts*, 353 U.S. 230 (1957); *Pennsylvania v. Brown*, 392 F.2d 120 (3d Cir. 1968), *cert. denied*, 391 U.S. 921 (1968).

(c) *Private Employers Insured by SWIF*

Although counsel for the Commonwealth seems to have drawn a distinction between SWIF acting as insurer for a public employer and SWIF acting as insurer for a private employer, our analysis in the preceding subsection leads to the conclusion that SWIF acts for the state whenever it acts. Accordingly, the force of that argument requires us to find that state action exists when SWIF invokes the automatic supersedeas provision of section 413 even when SWIF does so on behalf of a private employer.

(d) *Private Insurers and Self-Insured Private Employers*

We have found state action, then, whenever a public entity insures itself and whenever either a public or private employer uses SWIF to insure. In any of these cases, invocation of the automatic supersedeas by the self-insuring public employer or by the public insurer is "fairly attributable to the state" because the state itself

invokes section 413. We cannot base our conclusion on this ground, however, when a private insurer or employer uses section 413.

We note initially that *Silas v. Smith*, 361 F. Supp. 1187 (E.D. Pa. 1973), dealt with the private employer/private insurer situation. See our discussion at p. 2, *supra*. The *Silas* court found no state action in a private insurer's invocation of the automatic supersedeas.[18] The Pennsylvania Commonwealth Court was assessing the private employer/private insurer situation when, in reliance on *Silas*, it found the current section 413 constitutionally acceptable. *Henderson v. Workmen's Compensation Appeal Bd. (Rockwell International)*, 69 Pa. Commw. 613, 452 A.2d 277 (1982), *petition for allowance of appeal denied* (Pa. March 8, 1983); *see also Commonwealth Dept. of Labor and Industry v. Workmen's Compensation Appeal Bd.*, 58 Pa. Commw. 413, 416 n.3, 427 A.2d 1277, 1278 n. 3 (1981)(citing *Silas* for the proposition that notice and a hearing are not required for an automatic supersedeas in

[18] The *Silas* court also found that the process accorded was in conformity with due process standards. Prior to *Silas* a three-judge court had held Georgia's automatic supersedeas unconstitutional in the private insurer/private employer context. *Davis v. Caldwell*, 53 F.R.D. 373 (N.D. Ga. 1971).

a case involving a private insurer). We do not find these precedents dispositive here.[19]

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[19] Decisions by Pennsylvania courts on issues of federal law merit our respectful consideration, but they are not controlling precedents.

In analyzing *Silas*' precedential weight, we note that, even if we believed that *Silas* stood on all fours with this case, we could not merely follow *Silas* without further inquiry. In *Farley v. Farley*, 481 F.2d 1009 (3d Cir. 1973), the court considered an appeal from a district judge's ruling which had dismissed a complaint without convening a three-judge court on the ground that a decision of a prior three-judge panel in the same district was controlling. The Court of Appeals initially held that the earlier three-judge opinion did not completely determine the question in *Farley*. The Court of Appeals then wrote: 'even if *Kaelin* had decided the precise issue, its holding is not a precedent binding on other courts. The decision of a three-judge court is entitled to no more weight than any other district court decision." 481 F.2d at 1012; *accord San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1315 n. 24 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *Mazer v. Weinberger*, 385 F. Supp. 1321, 1324 (E.D. Pa. 1974)(three-judge court under 28 U.S.C. §§2282--2284 declining to follow previous three-judge court's decision), *vacated on other grounds*, 422 U.S. 1050 (1975); *Johnson v. Hodges*, 372 F. Supp. 1015, 1020 (E.D. Ky. 1974)(one-judge district court declining to follow previous three-judge court's decision). Thus, while we take *Silas* seriously as persuasive precedent, *Farley* enjoins us to consider the issues in this case anew.

We do not, however, believe that *Silas* does stand on all fours with this case even in our consideration of state action on the part of private insurers. The *Silas* court characterized the worker's compensation arrangement as one of private contract:

> The possessory interest in property emphasized in *Fuentes* [*v. Shevin*, 407 U.S. 67 (1972),] is absent here. What is here involved is a contractual (although sanctioned by statute) claim to benefits which the other party to the contract disputes. As such, this interest is indistinguishable from the interest of the recipient of funds in any commercial situation in which periodic payments are terminated pending resolution of the underlying dispute.

361 F. Supp. at 1192.

(Footnote continued on following page.)

We hold that invocation of section 413's automatic supersedeas provision by a private insurer or by a private employer involves state action. The Supreme Court has "consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Lugar*, 457 U.S. at 941. "[I]n this context 'joint participation' [does not require] something more than invoking the aid of state officials to take advantage of state created attachment procedures." 457 U.S. at 942.

In order to invoke the automatic supersedeas, an insurer or employer must file a petition on a form provided by the state. A state agency, the Bureau of Worker's Compensation, must review the petition before the supersedeas may take effect. Although the Bureau

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(Footnote continued from preceding page.)

In order to characterize a situation as one of ordinary contract, the parties must have some option to change the usual distribution of rights. *See, e.g., Silas*, 361 F. Supp. at 1188 ("Neither the employer nor the employee is bound to accept the provisions of the Workmen's Compensation Act . . . ."). Thus, in the ordinary commercial situation the payor may terminate periodic payments pending resolution of a dispute, but the parties can always decide at the beginning to provide security for the payee so that the payee, and not the payor, in effect holds the funds during a dispute.

Since the decision in *Silas*, Pennsylvania has amended the Workmen's Compensation Act to make it mandatory. Act No. 263, §5, 1974 Pa. Laws 782, 784 (repealing section 302 of the Act, former Pa. Stat. Ann. tit. 77, §§461, 462 (Purdon 1952)). We believe that the change in the coverage of the Act from optional to mandatory attenuates *Silas*' analogy of section 413's automatic supersedeas to the operation of any ordinary commercial contract. The mandatory quality of the Act now makes every aspect of the compensation scheme's operation appear more "public" and less "private."

does not review the petition's merits, it does review the petition for formal compliance with the Workmen's Compensation Act; the Bureau has a form for returning inadequate petitions. Unless the insurer or employer satisfies the Bureau of the petition's compliance with section 413, the insurer or employer cannot terminate the employee's benefits. Further, the insurer/employer relies on the Bureau to notify the employee of the termination of benefits.[20]

Section 413's automatic supersedeas procedure requires a filing with the Bureau of Worker's Compensation. This filing is sufficient to constitute

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[20] *Blum v. Yaretsky*, 457 U.S. 941 (1982), is not at odds with the conclusion that this involvement of the state in an automatic supersedeas petition constitutes "joint participation." *Blum* involved a challenge to a New York statute which permitted a private board of doctors at each nursing home to determine if a Medicare recipient required less intensive care. If the doctors made this determination, the nursing home would transfer the patient to a less care-intensive facility. In finding no state action, the Court took pains to point out that the state never reviewed the transfer decision in any way. While the state received notice of the transfer, the state only decided whether or not to adjust the patient's Medicare benefits. 457 U.S. at 1010. *Blum*, then, leaves open the question whether, had New York reviewed the transfer decision, New York would then have been deemed, for Fourteenth Amendment purposes, to be a joint participant in the transfer decision. *See also Jackson v. Metropolitan Edison Co.*, 419 U.S. 351, 354-355 (1974)(specifically distinguishing a termination of electricity service with state approval from a termination initiated according to procedures approved by the state in a general tariff); *Community Medical Center v. Emergency Medical Services*, 712 F.2d at 881 (noting the Supreme Court's distinction between "direct" and "indirect" involvement).

"joint participation" and to subject private invocation of the automatic supersedeas to the due process clause.[21]

[21] In this section we have concluded that we can fairly attribute to the state an invocation of section 413's automatic supersedeas. We have based this conclusion upon section 413's requirement that an employer or insurer file a petition with the Bureau of Workmen's Compensation which the Bureau checks for formal compliance with the Act and the Bureau's regulations, and which the Bureau sends to the terminated employee. We think these ingredients of formal and systemic participation by state personnel stamp the termination of benefits as the state action for which the state is accountable, within the intendment of the Fourteenth Amendment, under the controlling decisions of the Supreme Court.

We acknowledge, however, some sense of unease about applying a mode of legal analysis which, as Judge Sloviter has cogently phrased it, "hinges a finding of state action on what appears to be the somewhat superficial factor of involvement by a state official rather than on a more reasoned approach which takes into account state interests and state policy . . . ." *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1327 (3d Cir. 1982). Such a "more reasoned approach" would very likely ask the question whether the statutorily defined system of worker's compensation is in its fundamental social and economic implication more akin to a contractual undertaking of employer and employee than it is to a disability insurance system established by the state as part of its welfare network. That would seem a more nourishing question than the somewhat wooden "state action" logomachy which the Court's jurisprudence has required judges to pursue for a full one hundred years. *Civil Rights Cases*, 109 U.S. 3 (1883).

To recognize that the prescribed analysis is a wooden one—and, moreover, one which is by no means easy, *Community Medical Center v. Emergency Medical Services*, 712 F.2d at 879 n.4—is not to indict it. The lines within which conventional "state action" analysis has been channeled by the Supreme Court have the advantage of being susceptible of relatively systematic application from case to case.

Nonetheless, we comfort ourselves in this case with the feeling that if the alternative approach adumbrated by Judge Sloviter could be rigorously pursued, it would yield the same answer that we have arrived at by a more conventional path.

(C) *Due Process*

Having decided that benefits terminations under section 413's automatic supersedeas provision must comply with the Fourteenth Amendment, we now consider whether section 413 accords plaintiffs sufficient process to constitute due process. *See, e.g., Perri v. Aytch,* No. 83-1072, Slip Op. at 9 (3d Cir. Dec. 22, 1983) ("Even though Perri had a property interest in her probationary employment, she must still demonstrate that she was deprived of the interest without due process of law.") We agree with the Supreme Court of Iowa that *Mathews v. Eldridge,* 424 U.S. 319 (1976), makes the automatic supersedeas unconstitutional. *See Auxier v. Woodward State Hospital-School,* 266 N.W.2d 139 (Iowa 1978), *cert. denied,* 429 U.S. 830 (1979) (holding Iowa version of section 413 unconstitutional).[22]

In *Mathews,* the Supreme Court held that the Social Security Administration need not provide an evidentiary hearing before terminating an individual's Social Security Disability Insurance benefits. *Cf. Goldberg v. Kelly,* 397 U.S. 254 (1970) (requiring pretermination evidentiary hearing for recipient of AFDC). The Court concluded in *Mathews* that disability insurance recipients threatened with a loss of benefits were accorded a sufficient pretermination process, albeit that process was not of a formal evidentiary nature, so that an evidentiary hearing could be postponed until after termination.

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[22] We note that the *Silas* court did not have the benefit of *Mathews*' teachings.

The Social Security procedure provided that

> [w]henever the agency's tentative assessment of the beneficiary's condition differs from his own assessment, the beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file. He may also respond in writing and submit additional evidence.

424 U.S. at 337-338 (footnote omitted); *see also Washington v. Secretary of Health and Human Services*, 718 F.2d 608, 609-610 (3d Cir. 1983) (describing waiver of these procedural protections). The procedures sustained in *Mathews* were perceived by the Court as "provid[ing] the claimant with an effective process for asserting his claim prior to any administrative action . . . ." 424 U.S. at 349. In marked contrast, section 413 provides no notice whatsoever until *after* the termination of benefits pending a final hearing.[23]

IV.

The foregoing discussion has led us to the conclusion that operation of the automatic supersedeas authorized by section 413 of the Pennsylvania Workmen's Compensation Act involves conduct reasonably attributable to the state and that section 413 does not

[23] The *Mathews* court also noted several other procedural protections primarily involving substantive agency review of a file before termination. 424 U.S. at 337. While we view the absence of similar provisions here as incrementally compounding the procedural frailty of the system, what is from a due process perspective the fatal flaw in section 413 is the lack of notice and of an opportunity to submit any evidence or argument before termination.

accord worker's compensation recipients due process. Thus, plaintiffs have made out a violation of 42 U.S.C. §1983 (Supp. V 1981). Plaintiffs are entitled to entry of a judgment declaring the unconstitutionality of the automatic supersedeas provision of section 413.

Invalidation of the automatic supersedeas provision does not call for invalidation of any other provision of the Workmen's Compensation Act, even though the Act contains no severability provision. "Under Pennsylvania law, separate provisions of a statute are presumed severable, and any particular one will survive a decision voiding another unless it is so interrelated with the void provision or incomplete without it that the legislature could not have intended it to stand alone." *Stoner v. Presbyterian Hospital*, 609 F.2d 109, 112 (3d Cir. 1979) (citing 1 Pa. Cons. Stat. Ann. §1925).[24]

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[24] A different perspective on separability would come into play if, on appeal, our holding that every invocation of section 413 involves state action is found to be too sweeping. In section III(B)(2) of this opinion we determined that, from the perspective of the Fourteenth Amendment and section 1983, the temporary termination of benefits was a deprivation fairly attributable to the state whether the automatic supersedeas was utilized by a self-insuring government agency, by SWIF on behalf of a governmental or a private employer, or by a private insurer/employer. Assuming *arguendo* we were wrong in viewing a private insurer/employer's utilization of the automatic supersedeas procedure as state action, the question would arise whether the automatic supersedeas should be held valid in that aspect and invalid in the other aspects, or should be held invalid in its entirety. We think it highly unlikely that the Legislature would differentiate between the procedural entitlements of employees on the basis of their employer or their employer's choice of insurer merely because the Constitution permitted this distinction. Accordingly, we would conclude that if the automatic supersedeas provision is invalid as to any class of employers or insurers, the automatic supersedeas must be stricken in its entirety.

Opinion on Merits and Order for Submissions.

RICHARD BAKSALARY, *et al.*,

v.

SMITH, *et al.*

C.A. No. 76-429.

ARLIN M. ADAMS
ADAMS, *J.*, concurring

For nearly two decades, federal courts have endeavored to define the contours of due process rights applicable to state and federal entitlement programs. Today, this court turns its attention to the procedural constraints that due process places upon the Pennsylvania system of workmen's compensation terminations.

In *Goldberg v. Kelly*, 397 U.S. 254 (1969), the Supreme Court made it clear that the creation of a state entitlement program vests its recipients with due process protection against arbitrary termination of benefits. While *Goldberg* mandated an evidentiary hearing prior to termination of benefits under the Aid to Families with Dependent Children (AFDC) program, its emphasis upon the destitution of AFDC recipients left open the possibility that due process could be satisfied by less than a pre-termination evidentiary proceeding for the beneficiaries of other entitlement programs. Subsequently, in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court held that certain termination proceedings for Social Security disability benefits could be discontinued despite the absence of an evidentiary hearing and not violate due process so long as the

termination procedures were sufficiently reliable. Because workers' compensation is manifestly more comparable to the disability benefits involved in *Mathews* than the more protected AFDC benefits in *Goldberg*, I believe that further elaboration of the due process question presented in this case is in order.

I.

Recipients of statutorily created benefits have a property interest in the continued receipt of those benefits. *Board of Regents v. Roth*, 408 U.S. 564, 576-578 (1972); *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Goldberg, supra*, 397 U.S. at 261-62. The existence of this constitutionally protected property interest was not disputed in *Mathews*, where the Court noted,

> Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. . . .
>
> The Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. . . . The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."

424 U.S. at 332-33 (citations omitted).

Taking the lead from *Mathews*, this Court must determine whether the Pennsylvania supersedeas provision offers recipients of workmen's compensation payments a "meaningful time" and "meaningful

manner" to challenge terminations of such payments within the scope of due process. This determination must be made in the context of the specific "time, place and circumstances" of the challenged state procedure. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Thus under *Mathews* a reviewing court is compelled to balance the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal administration burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

My concern in the present case is with the second of the enumerated *Mathews* factors: whether the supersedeas termination procedure is sufficiently reliable to protect against erroneous termination. As the majority opinion makes clear, the challenged Pennsylvania statute offers the terminated compensation recipient only post-facto restoration of benefits. While the statute does allow for interest on the unpaid amounts found to be due as well as attorneys' fees in case of wrongful termination, a principal question in this proceeding, as I see it, is whether such an arrangement offers sufficient indicia of reliability to satisfy constitutional due process requirements.

II.

In *Mathews* the Supreme Court weighed the specific needs of the recipient class and the prescribed termination procedures that allow for the cessation of benefits without a full evidentiary hearing. The Court found that the potential injury to a discontinued recipient was the same as in *Goldberg*: the interrupted receipt of income pending final administrative review of the termination decision. Two critical factors distinguished the affected class in *Mathews* from that in *Goldberg*. First, as in the present case, disability recipients are not as destitute as AFDC recipients and therefore the "potential deprivation here is likely to be less than in *Goldberg*. . . ." 424 U.S. 341.[1] Second, *Mathews* focused on "the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards." 424 U.S. at 343. *Mathews* identified eight features of the social security disability statute that provided sufficient evidence of fairness and reliability:

> 1. Termination follows continuing eligibility monitoring by a physician and non-medical administrator;

[1] In *Goldberg* the Court emphasized:

> The crucial factor in this context—a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits.

397 U.S. at 264. *Mathews* found this exigency created by poverty not to apply to disability recipients, "although the degree of difference can be overstated." 424 U.S. at 341.

2. There is periodic communication between the two monitors and the disability recipient;

3. In case of conflict between the monitors and the disability recipient, the recipient is examined prior to termination by an independent physician;

4. The recipient is provided immediate notice of agency intent to terminate benefits;

5. The recipient and/or his/her representative is allowed full access to all information relied upon by the state agency prior to termination and is allowed to respond in writing and submit additional evidence;

6. The state agency determinations are not final until reviewed by an examiner in the Social Security Administration's Bureau of Disability Insurance;

7. Benefits are terminated two months after the date when disability is found to have ceased in order to minimize economic shock;

8. Final determination is premised on technical, medical evaluation which does not require adversarial process beyond the submission of affidavits and documentary evidence.

424 U.S. at 337-38. The Pennsylvania supersedeas termination procedure therefore must be scrutinized in light of these features to determine whether it comports with the due process requirements of the Constitution.

III.

Judged against the procedures approved by the Supreme Court in *Mathews*, the Pennsylvania supersedeas has two grave faults. First, the statute imposes no requirement of notice to the employee prior to termination. Under 77 Penna. Stat. Ann. §774 (Purdon 1982), the filing of a supersedeas petition, accompanied by an affidavit of a physician declaring that the claimant has recovered, suspends compensation benefits to the extent that such benefits would cease if all the allegations contained in the petition were true; the challenged statute makes no mention of pre-termination notice. According to the deposition testimony of Workers' Compensation Referee Irvin Stander, medical examination reports and other documentary materials are not generally made available to the claimant until after termination and, on occasion, not until the actual post-termination hearing. Exhibit 61, at 7-12. Referee Stander acknowledged that he was aware of hearings at which "the claimant has never seen the report, he doesn't know what the report says, and he doesn't know what evaluation has been made of his disability . . . ." *Id.* at 12.

The failure to give notice distinguishes the supersedeas provision from the Pennsylvania non-evidentiary hearing termination procedure for unemployment benefits upheld in *Ross v. Horn*, 598 F.2d 1312 (3d Cir. 1979), *cert. denied*, 448 U.S. 906 (1980). *See also, Wilkinson v. Abrams*, 627 F.2d 650 (3d Cir. 1980); *Basciano v. Herkimer*, 605 F.2d 605 (2d Cir. 1978) (due process not violated by New York disability retirement benefits termination procedure because it gave notice to the claimant and allowed him or her to present evidence

challenging the termination). Moreover, as the majority opinion notes, the Supreme Court of Iowa struck down a state summary termination procedure similar to the challenged Pennsylvania statute for this precise failure to provide pre-termination notice. *Auxier v. Woodward State Hospital-School*, 266 N.W.2d 139 (1978) *cert. denied*, 429 U.S. 830 (1979). Relying on *Mathews*, the court in *Auxier* held:

> [D]ue process demands that, prior to termination of workers compensation benefits, except where the claimant has demonstrated recovery by returning to work, he or she is entitled to a notice which, as a minimum, requires the following:
>
> (1) the contemplated termination,
>
> (2) that the termination of benefits was to occur at a specified time not less than 30 days after notice,
>
> (3) the reason or reasons for the termination,
>
> (4) that the recipient had the opportunity to submit any evidence of documents disputing or contradicting the reasons given for termination, and, if such evidence or documents are submitted, to be advised whether termination is still contemplated,
>
> (5) that the recipient had the right to petition for review. . . .

Id. at 142-43. Similarly, the West Virginia Supreme Court of Appeals held that a state workmen's compensation termination must be preceded by written notice, an opportunity for the claimant to furnish relevant countervailing information, and an opportunity

under the applicable state statute to an evidentiary hearing upon timely protest to an adverse order. *Mitchell v. State Workmen's Compensation Comm'r*, 256 S.E.2d 1, 11-13 (1979). *See also Carr v. SAIF Corp.*, 670 P.2d 1037, 1046 (Or. C.A. 1983) (in banc) (Oregon workers' compensation termination requires preliminary notice of proposed cessation and of the evidence upon which termination is premised, as well as an opportunity to respond); Steele v. North Dakota Workmen's Comp. Bureau, 273 N.W.2d 692, 700-701 & n.4 (S. Ct. N.D. 1978), (reliance on *Mathews* and *Goldberg* to require notice, additional reliance on state law to require formal hearing if any material fact is disputed). *Cf. Laird v. Workers' Compensation Bd.*, 195 Cal. Rptr. 44 (Cal. C.A. 1983) (termination requires preliminary hearing).[2]

The second deficiency in the Pennsylvania arrangement is that it provides no independent check by state authorities on the termination certification by a physician. Thus a physician employed by an insurance carrier, to whom a disabled worker must periodically report, may at any point certify that the disability has ceased. As noted above, that certification alone immediately terminates benefits under the supersedeas provision. Although *Mathews* does not require a full evidentiary hearing, the Supreme Court has nevertheless observed, "[o]rdinarily, due process of law requires an

[2] Other state systems which avoid the due process problems present in no-notice procedure include those of Washington, *see* Herron v. McClanahan, 625 P.2d 707 (Wash. App. 1981) (presentation of documentary and deposition evidence to a jury), Florida *see* Wellcraft Marine Corp. v. Turner, 435 So.2d 865 (Fla. App. 3 Dist. 1983) (employer/carrier has burden of proof in any contested disability termination proceeding), and Maine, *see* Merrifield v. Hannaford Bros. Co., 409 A.2d 1313 (S. Ct. Me. 1980) (same).

opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest." *Memphis Light Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978). *See generally*, Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975). We need not set forth the precise minimum safeguards that would protect a termination not accompanied by an evidentiary hearing. However, it bears comment that the technical, medical testimony that insured reliability in *Mathews* was followed by two tiers of independent state and federal agency review prior to termination of benefits. In short, the use of the unchecked recommendation of a physician in the employ of an interested party to terminate a benefit in which a recipient has a cognizable property interest is at odds with the due process concepts set forth in *Mathews* and *Goldberg*.

IV.

Because the Pennsylvania supersedeas proceeding affords the affected party no notice and because it fails to provide a mechanism for insuring the relative reliability of its termination proceedings, the challenged Pennsylvania statute must fall. The centrality of the notice defect and the insufficient guarantee of decisionmaker impartiality requires this Court to hold that prospect of future settlement of the claim, even with the payment of interest and an atorneys' fee, does not satisfy the constitutional requirements of due process. Accordingly, I join in the result reached by the majority.

Judges Green and Pollak have authorized me to say that they join in this statement.

2-2-84
Copy To:
(See Attached List)

Opinion on Merits and Order for Submissions.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 76-429.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, and CHARLES SAMUEL Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORPORATION, and all other insurance carriers and/or self-insured employers similarly situated,

Defendants.

Filed February 1, 1984; MICHAEL E. KUNZ, Clerk.
By (Illegible) Dep. Clerk.

Opinion on Merits and Order for Submissions.

ORDER

The parties are directed to submit, on or before February 15, 1984, a proposed form of order, or, if they cannot agree, alternative proposed forms of order, implementing the holdings announced in the Opinion filed today. The submission of such a proposed form of order is without prejudice to the right of any of the parties to appeal.

ARLIN M. ADAMS,
ADAMS, *Circuit Judge*

CLIFFORD S. GREEN (per LMP)
GREEN, *District Judge*

LOUIS H. POLLAK
POLLAK, *District Judge*

February 1, 1984
2-2-84
Copy To:
(See Attached List)

Notice of Appeal—Circuit Court

U.S. DISTRICT COURT

Eastern District of Pennsylvania (District/State) — Philadelphia (Location)

U.S. TAX COURT [ ] CIRCUIT COURT

DOCKET NO._____

(leave blank)

District Docket No. 76-429.

District Judges
Adams, *Circuit Judge*
(Sitting by Designation)
Green and Pollak

FULL CAPTION IN DISTRICT COURT AS FOLLOWS:

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, and CHARLES SAMUEL Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORPORATION, and all other insurance carriers and/or self-insured employers similarly situated,

Defendants.

Filed August 29, 1984; MICHAEL E. KUNZ, Clerk.
By (Illegible) Dep. Clerk.

Notice of Appeal—Circuit Court.

NOTICE OF APPEAL
TO
U. S. COURT OF APPEALS, THIRD CIRCUIT

Notice is hereby given that Allstate Ins. Company, Harleysville Mut. Ins. Co., Ohio Casualty Group of Ins. Cos., Royal Ins. Co., Sun Company, Travelers Ins. Co. and Wausau Ins. Cos. objecting members of defendant class above (Party) named hereby appeal to the United States Court of Appeals for the Third Circuit from

[ ] Judgment
[x] Order
[ ] Other (Specify) _____

entered in this action on (Date) July 31, 1984 as amended by Order entered August 13, 1984.

DATED: August 29, 1984

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(Counsel for Appellant-Signature)
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(Name of Counsel-Typed)
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Notice of Appeal—Circuit Court.

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Notice of Appeal—Supreme Court

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Attorney For Appellants/Objecting Members of Defendant Class

UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 76-429.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER and CHARLES SAMUEL, Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORPORATION, and all other insurance carriers and/or self-insured employers similarly situated,

Defendants.

Filed September 20, 1984; MICHAEL E. KUNZ, Clerk.
By _____ Dep. Clerk.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Allstate Insurance Company, Argonaut Insurance Company, Harleysville Mutual Ins. Company, Ohio Casualty Group of Ins. Companies, Royal Insurance Company, Sun Company, Inc., Travelers Ins. Company and Wausau Ins. Companies hereby appeal to the Supreme Court of the United States from the Order entered in this action on July 31, 1984, as amended by Order entered August 13, 1984.

This appeal is taken pursuant to 28 U.S.C. §1253.

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September 20, 1984

Notice of Appeal—Supreme Court.

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Attorney For Appellants/Objecting Members of Defendant Class

Civil Action No. 76-429.

RICHARD BAKSALARY et al,

Plaintiffs,

v.

PAUL J. SMITH, et al.,

Defendants.

CERTIFICATE OF SERVICE

I, R. D. HARBURG, Esquire, being a member of the Bar of the United States Supreme Court, and as counsel for appellants/objecting members of defendant class, hereby certify that a true and correct copy of the foregoing Notice of Appeal has been served by First Class, U. S. Mail, Postage Prepaid, on all counsel for parties, who signed Consent Decree, as follows:

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RICHARD D. HARBURG
R.D. HARBURG
Swartz, Campbell & Detweiler
Counsel for Appellants

September 20, 1984

Memorandum and Interim Order

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 76-429.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, and CHARLES SAMUEL Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORPORATION, and all other insurance carriers and/or self-insured employers similarly situated,

Defendants.

Filed March 15, 1984; MICHAEL E. KUNZ, Clerk.
By (Illegible) Dep. Clerk.

Before: ADAMS, *Circuit Judge,**
GREEN and POLLAK, *District Judges.*

* Honorable Arlin M. Adams, United States Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

Memorandum and Interim Order.

MEMORANDUM

Pollak, District Judge March 15, 1984

On February 1, 1984, this court filed two Opinions disposing of the constitutional contentions in this case. All three judges of this court agreed that the invocation of the procedure authorized by the first sentence of section 413(a) of the Pennsylvania Workmen's Compensation Act ("the automatic supersedeas provision"), Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1982), to terminate an individual's worker's compensation benefits without prior notice or a pretermination opportunity to be heard violates the Due Process Clause of the Fourteenth Amendment. Because, in briefing the merits of this case, the parties had not addressed the question of appropriate relief in sufficient depth to permit this court to frame the order at the time the Opinions were filed, the court directed the parties to submit, no later than February 15, a joint form of order. In the event the parties could not agree, the parties were to submit alternative forms of order.

On February 15, the date set for submission of the remedial requests, the court received a proposed order from plaintiffs, another from defendants Smith, Urling, Sheppard, and Sloan ("the Commonwealth Defendants"), two others from defendant State Workmen's Insurance Fund ("SWIF"), and four more from defendants School District of Philadelphia, Bituminous Casualty Corporation, Pennsylvania Manufacturers' Association Insurance Company, Liberty Mutual Insurance Company, and American Mutual Liability Insurance Company. The parties then submitted initial briefs in support of their respective proposed forms of order on March 6 and reply briefs on March 12. Bituminous

Casualty Corporation's reply brief included a fifth proposed form of order. The School District of Philadelphia has requested an extension of time to file a brief. Several parties have requested oral argument on the pending remedial issues.

Some of the remedial issues presented by the parties' submissions would benefit from development at oral argument. Other issues are sufficiently dealt with in the materials already submitted so that argument seems unnecessary. Accordingly, the accompanying Order schedules argument for a date certain—March 28, at 9:30 a.m.—and also disposes today of certain issues which, in our judgment, do not warrant oral argument.

(1) *Declaratory Relief*

All parties agree that this court's Opinions of February 1 require, at a minimum, that this court enter an Order granting declaratory relief. In their proposed forms of order, several defendants requested that this court's order not take effect for some period following its filing. No defendant has pressed this request in its brief. We do not believe that any party requires further notice of the automatic supersedeas provision's invalidity. This court's February 1 Opinions clearly and repeatedly stated our view that the automatic supersedeas provision was unconstitutional. The parties have had notice of those Opinions for over one month. Accordingly, the accompanying Order declares that any future invocation of the automatic supersedeas provision of the Workmen's Compensation Act violates the Due Process Clause of the Fourteenth Amendment. This declaration does not purport to resolve, one way or another, questions as to the validity of invocations of the automatic supersedeas provision between February 1 and today.

Several defendants have expressed concern that the court's relief not affect any provision other than the automatic supersedeas provision of section 413(a). In particular, Bituminous Casualty Corporation requests that this court expressly affirm the validity of the benefit suspension procedure sanctioned by section 413(c), Pa. Stat. Ann. tit. 77, §774.2 (Purdon Supp. 1982). Memorandum of Defendant, Bituminous Casualty Corporation at 19-21.

Throughout this litigation the parties have addressed themselves to the constitutionality of the invocation of the following provision of section 413(a) of the Pennsylvania Workmen's Compensation Act:

> The filing of a petition to terminate or modify a notice of compensation payable or a compensation agreement or award as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require only when such petition alleges that the employe has returned to work at his prior or increased earnings or where the petition alleges that the employe has fully recovered and is accompanied by an affidavit of a physician on a form prescribed by the department to that effect which is based upon an examination made within fifteen days of the filing of the petition.

Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1982). We have called this first sentence of section 413(a) the automatic supersedeas provision.

Any relief granted in this case pertains only to the operation of the automatic supersedeas provision. The parties have not heretofore directly addressed the

constitutional validity of any other provision of the Act, and resolution of the merits of this case has not called any other provision of the Act into question. Accordingly, we will not declare the suspension procedure of section 413(c) valid nor will we declare it invalid.

(2) *Prospective Injunctive Relief*

Plaintiffs have requested that this court enjoin any future invocations of the automatic supersedeas provision. Plaintiffs further request that this court order the Bureau of Worker's Compensation to notify all plaintiffs and defendants of any injunction entered.

The Commonwealth Defendants oppose any injunctive relief. They argue that declaratory relief will suffice to preclude future invocations of the automatic supersedeas provision because the Workmen's Compensation Act provides procedures to enforce an obligation to pay continued benefits. Further, the Commonwealth Defendants contend that principles of comity require this court to allow the Bureau to use those enforcement procedures against employers and insurers who improperly terminate compensation benefits; the Commonwealth Defendants argue that this federal court should limit itself to declaring constitutional entitlements and not intrude upon the operation of a state program.

On the other hand, the private insurance company defendants and the School District of Philadelphia have proposed several forms of injunctive relief mandating that the state adopt, in substitution for the automatic supersedeas, certain procedures which the private insurers and the School District believe satisfy constitutional constraints. Plaintiffs, SWIF and the Commonwealth Defendants oppose any such order.

We believe that both plaintiffs' request for injunctive relief running against the private defendants, SWIF, and/or the Commonwealth Defendants, and the Commonwealth Defendants' comity argument against such relief deserve further development at oral argument. Further, in the event that we conclude that a decree enjoining continued invocation of the automatic supersedeas is appropriate, plaintiffs' request for some form of notice to members of the defendant and plaintiff classes may have some merit. However, we see no circumstances under which we would grant injunctive relief mandating adoption of a procedure of our selection to replace the automatic supersedeas provision. A federal court cannot enact state law. Further, we do not read the Workmen's Compensation Act to require adoption of any of the proposed alternative procedures. Accordingly, this court will not hear argument in support of Proposed Order Number 1, ¶¶5-8, 10-13, of Defendants, School District of Philadelphia, Bituminous Casualty Corporation, Pennsylvania Manufacturers' Association Insurance Company, Liberty Mutual Insurance Company and American Mutual Liability Insurance Company; Proposed Order Number 2, ¶¶8-11, 13-14; Proposed Order Number 3, ¶¶8-11, 13-16; or Proposed Order Number 5, pp. 3-5.

(3) *Retrospective Relief*

The parties disagree sharply over whether this court should enter any Order which applies to invocations of the automatic supersedeas provision before the date of the Order. We wish to hear argument on this issue. We note in this connection that no party seeks relief on behalf of a person against whom a defendant invoked the automatic supersedeas provision before February 1, 1984, in a termination petition that was no longer

pending before the Bureau of Worker's Compensation or any other tribunal on that date. Accordingly, this court does not anticipate that any form of retrospective relief fashioned by this court would award anything to persons in that category.

(4) *The School District's Request for an Extension*

This court is of the view that all parties will benefit from resolution of remedial issues, particularly prospective remedial issues, as quickly as possible. With that in mind, and believing that all parties have had adequate time to brief the issues, the court will not delay disposition of those issues it has determined are now ripe for resolution in order to accommodate the School District of Philadelphia's request for additional time. As to the issues to be considered at oral argument on March 28, the School District will be given leave to file a memorandum no later than March 19.

3/16/84
Copy To:
(See Attached List)

Memorandum and Interim Order.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 76-429.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, and CHARLES SAMUEL Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORPORATION, and all other insurance carriers and/or self-insured employers similarly situated,

Defendants.

Filed March 15, 1984; MICHAEL E. KUNZ, Clerk.
By (Illegible) Dep. Clerk.

ORDER

Upon consideration of the written submissions of the parties and for the reasons stated in the accompanying Memorandum and this court's Opinions of February 1, 1984:

(1) (a) For purposes of this Order, the term "automatic supersedeas provision" shall refer to the first sentence of section 413(a) of the Pennsylvania Workmen's Compensation Act, codified as the first sentence of Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1982).

(b) The automatic supersedeas provision of the Pennsylvania Workmen's Compensation Act authorizes a procedure which violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Any invocation by any defendant of the automatic supersedeas provision after this date in order to terminate an individual's worker's compensation benefits without prior notice or a pretermination opportunity to be heard is hereby DECLARED to be a deprivation of that individual's property without due process of law.

(2) The requests of defendant School District of Philadelphia, Bituminous Casualty Corporation, Pennsylvania Manufacturers' Association Insurance Company, Liberty Mutual Insurance Company, and American Mutual Liability Insurance Company, that this court enter an order requiring the Bureau of Worker's Compensation to adopt a procedure alternative to that authorized by the automatic supersedeas provision is DENIED. The court will not hear argument on these

defendants' Proposed Order Number 1, ¶¶5-8, 10-13; Proposed Order Number 2, ¶¶8-11, 13-16; Proposed Order Number 3, ¶¶ 8-11, 13-16; or Proposed Order Number 5, pp. 3-5.

(3) This court will not hear argument that any person is entitled to relief due to the invocation of the automatic supersedeas provision against such person when that invocation occurred before February 1, 1984, and when the Bureau of Worker's Compensation, the Workmen's Compensation Appeal Board, and all state courts had, by February 1, 1984, disposed of that person's employer's termination petition or that person's employer's insurer's termination petition.

(4) The School District of Philadelphia's request for an extension of time to file a memorandum of law is DENIED insofar as the School District's memorandum pertains to issues disposed of by this Order and the accompanying Memorandum. However, the School District shall have until March 19, 1984, to file a memorandum dealing with any other remedial issues.

(5) The court shall hear oral argument on all remaining remedial issues at 9:30 a.m. in courtroom 13B on Wednesday, March 28, 1984.

(6) Neither the submission by any party of a proposed form of order, nor the submission of a memorandum in support of a proposed form of order, nor the argument of any position on any remedial issue in this matter, shall prejudice any party's right to appeal. Such submission will be understood by this court merely to represent that party's view of the relief appropriate to implement this

court's Opinions of February 1, and will not be understood to betoken that party's acquiescence in those Opinions.

ARLIN M. ADAMS
ADAMS, *Circuit Judge*

CLIFFORD SCOTT GREEN
GREEN, *District Judge*

LOUIS H. POLLAK
POLLAK, *District Judge*

MARCH 15, 1984

3/16/84
Copy To:
Robert Lear, Esq.
(See Attached List)

Joint Motion and Proposed Consent Decree

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 76-429.

RICHARD BAKSALARY, et al.,

v.

PAUL J. SMITH, et al.

Filed April 27, 1984; MICHAEL E. KUNZ, Clerk.
By LVC Dep. Clerk.

JOINT MOTION FOR PRELIMINARY APPROVAL OF CONSENT DECREE AND FOR APPROVAL OF TRANSMISSION OF NOTICES OF SETTLEMENT TO MEMBERS OF THE PLAINTIFF AND DEFENDANT CLASSES

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, named and class plaintiffs, and named defendants Paul J. Smith, C. John Urling, Jr., William J. Sheppard, Grace M. Sloan (hereafter "Commonwealth defendants"), the State Workmen's Insurance Fund, Pennsylvania Manufacturers' Association Insurance Company, American Mutual Liability Insurance Company, the School District of Philadelphia, Bituminous Casualty Corporation, and intervening defendant Liberty Mutual Insurance Company, by their undersigned counsel, hereby move the Court for preliminary approval of the proposed Consent Decree

annexed hereto and incorporated herein by reference. As more fully set forth in the accompanying Memorandum of Law, the moving parties believe that the proposed Consent Decree represents a fair, adequate and reasonable settlement of the litigation and one which, viewed as a whole, advances the best interests of all the members of the plaintiff and defendant classes. For these reasons, the moving parties respectfully request that the Court grant preliminary approval to the proposed Consent Decree.

The moving parties also respectfully request the Court under Rule 23(e) of the Federal Rules of Civil Procedure to approve the transmission of the proposed Consent Decree, and the accompanying notices, to each member of the plaintiff and defendant classes. The form and content of the class notices are set forth in Exhibits H and J to the proposed Consent Decree. In counsel's view, the notices and the procedure for notifying class members satisfy both the requirements of due process and Rule 23(e). Therefore, they should be approved by the Court.

A proposed form of Order is attached for the Court's consideration.

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Joint Motion and Proposed Consent Decree.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 76-429.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, and CHARLES SAMUEL, Individually and on behalf of all others similarly situated,

v.

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORPORATION, and all other insurance carriers and/or self-insured employers similarly situated.

ORDER

AND NOW this _____ day of _____, 1984, after due consideration of the Joint Motion for Preliminary Approval of Consent Decree and for Approval of Transmission of Notice of Settlement to Members of the Plaintiff and Defendant Classes, the Memorandum supporting the Joint Motion, and the proposed Consent Decree itself,

Joint Motion and Proposed Consent Decree.

IT IS ORDERED that:

1. The proposed Consent Decree ("Decree") is preliminarily APPROVED since it appears to be, at this stage of the proceedings, a fair, adequate and reasonable resolution of the litigation.

2. Transmittal of notice of the Decree by the Bureau of Workers' Compensation to members of the plaintiff and defendant classes is APPROVED. The form and content of the respective class notices, as set forth in Exhibits H and J to the Decree, are also APPROVED.

3. The Bureau of Workers' Compensation ("Bureau") shall transmit the proposed Consent Decree and class notices to members of the plaintiff and defendant classes by regular mail as promptly as possible, and in any event no later than ten (10) days after the date of the entry of this Order. The Bureau shall file with the Clerk of Court a notarized affidavit, with copies served on counsel of record, attesting to the transmission of these documents to members of the plaintiff and defendant classes.

4. Written objections, if any, to the proposed Decree and the plaintiffs' proposed resolution of the unsettled issue, identified in paragraph 3 of the Decree, if any, must be filed with the Clerk of Court within thirty (30) days of the date of this Order, i.e., on or before _____ ____, 1984. Any such filings should briefly but clearly state the basis for the objection presented.

5. The Court will hold a fairness hearing on _____ ____, 1984 (i.e., thirty-five days after the date of this Order) at ____.m., in Courtroom 13B to consider whether to grant final approval to the proposed Decree, and to consider the resolution of the unsettled issue identified in

paragraph 3 of the Decree. At this hearing, any member of the plaintiff or defendant class, or their counsel, who has filed a timely written objection to the Decree, may present to the Court the basis for any such objection, or such other comments as the Court may deem to be relevant and material to its consideration whether to grant final approval to the Decree and to its resolution of the unsettled issue identified in paragraph 3 of the Decree.

6. Counsel for the moving parties to the Joint Motion may respond at the fairness hearing to any objections or comments presented to the Decree. Further, these counsel shall be permitted to file written responses, to the extent deemed necessary and at such time as determined by the Court, to the objections and/or comments raised by any class member at the fairness hearing.

HONORABLE ARLIN M. ADAMS
Circuit Court Judge

HONORABLE LOUIS H. POLLAK
District Judge

HONORABLE CLIFFORD SCOTT GREEN
District Judge

Joint Motion and Proposed Consent Decree.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 76-429.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, and CHARLES SAMUEL Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORPORATION, and all other insurance carriers and/or self-insured employers similarly situated,

Defendants.

Joint Motion and Proposed Consent Decree.

CONSENT DECREE

I. *INTRODUCTION*

This lawsuit was commenced by plaintiffs on February 13, 1976. It challenged the constitutionality of the automatic supersedeas provision of section 413(a) of The Pennsylvania Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, §774.[1] Suit was brought under Section 1 of the Civil Rights Act of 1871, 42 U. S. C. §1983, and alleged violations of the Due Process clause of the Fourteenth Amendment of the United States Constitution. A statutory three-judge federal district court was convened pursuant to 28 U.S.C. §2281 to hear and determine the merits of plaintiffs' claims.[2]

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[1] The automatic supersedeas procedure challenged by plaintiffs is set forth in the first sentence of the fourth paragraph of section 413(a). That sentence provides:

> The filing of a petition to terminate or modify a notice of compensation payable or a compensation agreement or award as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require only when such petition alleges that the employe has returned to work at his prior or increased earnings or where the petition alleges that the employe has fully recovered and is accompanied by an affidavit of a physician on a form prescribed by the department to that effect which is based upon an examination made within fifteen days of the filing of the petition.

[2] The members of the court included the Honorable Arlin M. Adams, Circuit Court Judge of the United States Court of Appeals for the Third Circuit, the Honorable Herbert A. Fogel and the Honorable Clifford Scott Green, District Judges of the United States District Court for the Eastern District of Pennsylvania. In 1978 the Honorable Louis H. Pollak was assigned the case to replace Judge Fogel who had left the bench.

The complaint was filed by six named plaintiffs whose workers' compensation benefits had been terminated under section 413(a)'s automatic supersedeas procedure.[3] Named as defendants were four state officials, including two who are responsible for administering The Pennsylvania Workmen's Compensation Act,[4] as well as three insurance carriers,[5] one self-insured employer,[6] and the statutorily created State Workmen's Insurance Fund ("SWIF")—each of which had terminated workers' compensation benefits under the automatic supersedeas procedure of section 413(a).[7]

On March 28, 1978 the court entered an order under Rule 23(b)(2) of the Federal Rules of Civil Procedure permitting the action to proceed as both a plaintiffs' and defendants' class action. On the plaintiffs' side, the class was defined to include all persons whose benefits had been, or would be terminated, under section 413(a)'s automatic supersedeas procedure. On the defendants' side, the class was defined to include all insurance carriers and self-insured employers who had invoked, or would in the future invoke, the automatic supersedeas procedure of section 413(a).

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[3] Two of the named plaintiffs were subsequently dismissed from the case by stipulation of the parties.

[4] *I.e.*, the Secretary of Labor and Industry, and the Director of the Bureau of Workers' Compensation.

[5] Pennsylvania Manufacturers' Association Insurance Company ("PMA"), American Mutual Liability Insurance Company ("American Mutual") and Bituminous Casualty Corporation ("Bituminous").

[6] The School District of Philadelphia.

[7] Subsequent to the filing of the complaint, an additional insurance company, Liberty Mutual Insurance Company, moved to intervene in the case as a named defendant. Its motion was granted by Judge Fogel on April 3, 1978.

Joint Motion and Proposed Consent Decree.

Following a lengthy period of pre-trial discovery, the parties submitted the case to the court through a comprehensive Stipulation of Facts and accompanying exhibits. These submissions were followed by briefs and oral argument in which counsel for the parties advocated the merits of their respective positions.

On February 1, 1984 the court, after considering the parties' contentions, ruled that the automatic supersedeas procedure of section 413(a) was unconstitutional and its use a violation of 42 U. S. C. §1983 in that it permitted insurance companies and self-insured employers to terminate a claimant's worker's compensation benefits without prior notice or an opportunity to be heard in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[8]

At the direction of the court, the named parties, through their counsel, submitted proposed forms of orders on February 15, 1984 addressed to the remedial

[8] The court's memorandum opinion was written by Judge Pollak and was joined by Judges Adams and Green. Judge Adams wrote a separate concurring opinion in which he addressed the due process deficiencies of the automatic supersedeas procedure. Both Judges Green and Pollak joined in Judge Adams' concurrence. A copy of the thrity-nine (39) page opinion of Judge Pollak and the ten (10) page concurring opinion of Judge Adams, as well as any other documents filed in the case, are available for inspection and/or purchase from the Clerk of Court at the following address:

Michael E. Kunz
Clerk of the United States District
Court for the Eastern District of
Pennsylvania
Room 2609 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

All inquiries to the Clerk should reference the caption of the case: *Baksalary, et al. v. Smith, et al.*, C.A. No. 76-429.

issues left to be resolved by the court's opinion, without prejudice to the defendants' right to appeal the decision on the merits. While differing on whether and to what extent injunctive relief was available to remedy the constitutional violations found by the court, all of the forms of relief presented by the parties to implement the holding of the Court in its liability opinion necessarily provided for a declaratory judgment. On March 15, 1984, the court entered an order, binding on all class members, declaring section 413(a)'s automatic supersedeas procedure to be unconstitutional.[9] It also scheduled oral argument on the remaining remedial issues.

Oral argument was initially scheduled for March 28, 1984, but was rescheduled for April 3, 1984. Prior to that date, the named parties, through their counsel, had commenced and engaged in extensive discussions with regard to an amicable settlement of all claims for relief raised by the litigation. By the afternoon of April 3, 1984, counsel had reached an agreement in principle on the outstanding remedial issues, and so advised the court. As a result, oral argument was not held, and counsel for the parties proceeded to draft this proposed Consent Decree (hereafter "Decree"), the provisions of which are intended to bind each member of the plaintiff and defendant classes.

II. *SCOPE OF DECREE*

1. This Decree settles finally and in full all class claims for relief which were, or could have been, raised by plaintiffs in this litigation, except to the extent set forth in paragraph 3 *infra*. The Decree's terms and

[9] The March 15, 1984 order also denied several named defendants' proposals to have the court order the Commonwealth to adopt a procedural alternative to the automatic supersedeas procedure struck down by the court's February 1, 1984 opinion.

provisions are intended to bind each named and class plaintiff and defendant, their agents, employees, heirs and successors. The entry of the Decree is intended as a compromise by the parties to avoid the burden and expense of further litigation. For that reason, this Decree has been entered into with the understanding that the terms and conditions hereof shall not be construed as a present or past admission of liability, or the violation of any law. Each named and class member of the plaintiff and defendant class hereby consents to the entry of this judgment as a final order with respect to all of the issues which were or could have been raised in this litigation.

2. It is specifically understood by and among the parties that the Decree shall not have any precedential impact in any litigation save this one.

3. This Decree does *not* resolve the remedial claims of those members of the plaintiff class whose workers' compensation benefits have been terminated under the automatic supersedeas procedure of section 413(a) as a result of termination petitions filed by any member of the defendant class after February 1, 1984. The claims for relief for this sub-group of plaintiffs have been severed and specifically reserved for a litigated judgment by the court. Because the named and intervening insurance carrier (including S.W.I.F.) and self-insured defendants have either not invoked the automatic supersedeas provision of the Act since February 1, 1984, or have reinstated benefits so terminated, said named defendants will not be representing the remaining sub-group of the defendants' class as to this unsettled issue. The sub-group of the defendants' class will receive special notice of this issue as part of Exhibit "J" attached hereto.

III. *DECLARATORY JUDGMENT*

4. The court's order of March 15, 1984 declared the automatic supersedeas provision of the first sentence of the fourth paragraph of section 413(a) of The Pennsylvania Workmen's Compensation Act, as codified at Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1982), to be an unconstitutional deprivation of plaintiffs' property in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. That declaratory judgment is set forth in full below:

> The automatic supersedeas provision of the Pennsylvania Workmen's Compensation Act authorizes a procedure which violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Any invocation by any defendant of the automatic supersedeas provision after this date in order to terminate an individual's worker's compensation benefits without prior notice or a pretermination opportunity to be heard is hereby DECLARED to be a deprivation of that individual's property without due process of law.

March 15, 1984 Order, at ¶1(b).

IV. *PROSPECTIVE INJUNCTION*

5. *Each* named and class defendant insurance carrier and self-insured employer is hereby ENJOINED now and in the future from invoking in any way the automatic supersedeas provision of section 413(a) of The Pennsylvania Workmen's Compensation Act to terminate the payment of workers' compensation benefits.

6. The Pennsylvania Bureau of Workers' Compensation (hereinafter, "Bureau") shall review each Petition For Termination, Suspension or Modification of Compensation (Form LIBC-40) submitted to it for filing by any named or class insurance carrier or self-insured employer to determine whether the petition has attempted to invoke the automatic supersedeas provisions of Section 413(a) of The Pennsylvania Workmen's Compensation Act. If, on the face of Form LIBC-40, the petitioner has invoked the unconstitutional automatic supersedeas provision, the Bureau shall send a letter to the insurance carrier or self-insured employer notifying it that the automatic supersedeas provision of Section 413(a) has been declared unconstitutional, that it must continue to pay all compensation benefits, and that termination of benefits may subject it to any and all penalties provided in The Pennsylvania Workmen's Compensation Act.

V. *INJUNCTIVE RELIEF FOR MEMBERS OF THE PLAINTIFF CLASS WHOSE BENEFITS WERE TERMINATED UNDER THE AUTOMATIC SUPERSEDEAS PROCEDURE AS A RESULT OF TERMINATION PETITIONS FILED ON OR BEFORE FEBRUARY 1, 1984.*

7. Subject to paragraphs 8 and 19, Special Supersedeas Hearings shall be scheduled by the Bureau for *each* member of the plaintiff class whose benefits have been terminated under the automatic supersedeas provision of section 413(a) as a result of a termination petition filed with the Bureau on or before February 1, 1984 and on which there has not yet been rendered a decision on the merits by a referee.

8. No Special Supersedeas hearing is required to be held for any claimant for whom an insurance carrier or

self-insured employer has alleged in such petition that the claimant has returned to work at earnings equal to or greater than the claimant's pre-injury earnings *unless* within thirty (30) days after the date of the notice of the proposed class action settlement any such claimant returns to the Bureau, a form attached hereto and marked Exhibit "A", which shall be provided to the claimant by the Bureau indicating that either (a) the claimant has not continuously received wages equal to or greater than his pre-injury wages from the date the petition was filed to present; or (b) there are compensable medical expenses remaining unpaid to the provider which have not been paid by the insurance carrier or self-insured employer. A claimant may subsequently submit such a form (Exhibit "A"), or raise the issue referred to in this paragraph at the next scheduled Referee's hearing, and in either event a Special Supersedeas Hearing shall be scheduled, but all relevant time frames for the scheduling of hearings subject to this paragraph and prospective resumption of benefits as set forth in paragraphs 9 and 14, shall commence to run from the date the form (Exhibit "A") is received by the Bureau or the issue is first raised before the Referee.

9. The Bureau shall schedule the Special Supersedeas Hearings to occur within sixty (60) days of the date of the court's final order approving this Decree.

10. In order to identify the members of the plaintiff class entitled to receive a Special Supersedeas Hearing as provided by paragraph 7 *supra*, the Bureau and each named and class member of the defendant class shall have the following responsibilities:

(a) The Bureau shall, within thirty (30) days of the court's order tentatively approving this Decree, conduct a review of all its pertinent files and records and develop

a list of all plaintiff class members who may be entitled according thereto to a Special Supersedeas Hearing under the terms of paragraph 7, *supra.* A copy of the list so generated shall be promptly forwarded to plaintiffs' counsel. The list shall contain, at a minimum, the name, address and social security number of the claimant, the identity of the insurance carrier or self-insured employer which filed the termination petition, the rate of weekly (or other) compensation benefits, the date the termination petition was filed and an indication as to whether there was attached to the petition a physician's affidavit of recovery or whether the petition contained an allegation that the claimant returned to work at wages equal to or in excess of the pre-injury wage.

(b) Each named and class defendant insurance carrier and self-insured employer shall conduct a review of all its pertinent files and records and, within thirty (30) days of the date of the notice of the proposed class action settlement, complete forms identifying each claimant who may be entitled to a Special Supersedeas Hearing under paragraph 7 *supra.* The forms so prepared shall be in the form attached hereto and marked Exhibit "B". A copy of the forms so prepared shall be forwarded by each insurance carrier and self-insured employer to the Bureau and to plaintiffs' counsel no later than thirty (30) days after the date of the notice of the proposed class action settlement.

(c) Any member of the plaintiff class identified by an insurance carrier or self-insured employer on a form it prepares in compliance with paragraph 10(b), but not identified by the Bureau on the list it prepares in compliance with paragraph 10(a), shall be entitled to receive all of the benefits conferred by the Decree.

11. The Special Supersedeas Hearings referred to in paragraph 9 *supra* shall be conducted in accordance with the provisions of the Special Rules of Administrative Practice and Procedure Before Referees set forth at 34 Pa. Code §§131.31-131.33 (hereafter, "Rules").

12. The Bureau shall provide written notice of the Special Supersedeas Hearings referred to in paragraph 9 *supra* to each member of the plaintiff and defendant class entitled to participate in such a hearing. The content of that notice shall be in the form attached hereto and marked Exhibit "C".

13. The Bureau shall notify in writing all other claimants subject to a termination petition filed on or before February 1, 1984, and on which there has not yet been rendered a referee's decision on the merits, that they have the right to request a supersedeas hearing if they contend in writing that their benefits were terminated under the automatic supersedeas procedure of section 413(a). The content of that notice shall be in the form attached hereto and marked Exhibit "D". Any such claimant shall thereafter be provided with a Special Supersedeas Hearing on the same terms and conditions as provided all other plaintiff members under section V of the Decree.

14. If no decision has been rendered by the referee assigned the Special Supersedeas Hearing by the seventh day following the expiration of the prescribed sixty (60) day period, then the payment of compensation benefits shall be resumed only prospectively commencing the day following the expiration of the foregoing sixty-seven (67) day period, by the insurance carrier or self-insured employer which filed the termination petition; provided,

however, that the payment of benefits need not be resumed prospectively if the referee finds in writing within the aforesaid sixty-seven (67) day period that the delay in conducting the Special Supersedeas Hearing or rendering a decision thereon was attributable to acts or omissions of the claimant or claimant's counsel of record; provided further, that at any time after the automatic resumption of benefits pursuant to the expiration of the aforementioned sixty-seven (67) day period, the Referee may order a temporary suspension of benefits when a Referee finds a delay either in rendering a decision on the merits or holding the Special Supersedeas Hearing is attributable to the acts or omissions of claimant or claimant's counsel of record; provided further, that no legal actions of any nature shall be instituted against the Commonwealth of Pennsylvania, its officials and employees, by any named or class party hereto, and no sanctions imposed against the Commonwealth, its officials and employees, in the event that any of the Special Supersedeas Hearings are not held within the prescribed sixty (60) day period; and provided further that the Commonwealth, its officials and employees, do not waive any defense or immunity under law.

VI. *PROVISIONS COMMON TO ALL SPECIAL SUPERSEDEAS HEARINGS*

15. In ruling on the supersedeas issue, the referee shall decide, in accordance with the applicable Rules:

(a) whether the claimant is entitled to any immediate payment of benefits of any nature; and

(b) the period or periods during which the claimant is so entitled, whether retrospectively or

prospectively, or both, including dates or weeks of entitlement during any such period or periods.

16. The decision of the referee on the supersedeas issue shall not be appealable as provided in the fourth paragraph of Section 413(a) of the Act. 77 P.S. §774.

17. Statutory interest as provided by section 406.1 of The Pennsylvania Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, §717.1 (Purdon Supp. 1982) shall be paid to all members of the plaintiff class determined by a referee to be entitled to receive a retroactive award of compensation.

18. For purposes of any Special Supersedeas Hearing required to be held under the terms of this Decree, the referee presently assigned the pending termination petition shall schedule and conduct the supersedeas hearing and render a decision on the supersedeas, except when temporary transfers are necessary to accommodate the illness or other unavailability of a referee or a disproportionately heavy caseload.

19. In all pending pre-February 2, 1984 automatic supersedeas cases in which the evidentiary record has been closed, a Special Supersedeas Hearing is not required to be held, provided however, that if a decision on the merits of the termination petition has not been rendered within seven (7) days following the expiration of the sixty (60) day period after the court's final approval of the Decree, the payment of benefits shall be resumed only prospectively by the insurance carrier or self-insured employer which filed the termination petition in which an automatic supersedeas was taken; provided, further, that the payment of benefits need not be

resumed prospectively if the referee finds in writing within the aforesaid sixty-seven (67) day period that the delay in rendering a decision on the merits was attributable to acts or omissions of the claimant or claimant's counsel of record; provided further that at any time after the automatic resumption of benefits pursuant to the expiration of the aforementioned sixty-seven (67) day period, the Referee may order a temporary suspension of benefits where a Referee finds a delay in rendering a decision on the merits is attributable to acts or omissions of the claimant or claimant's counsel; and provided, further, that no legal actions of any nature shall be instituted against the Commonwealth of Pennsylvania, its officials and employees, by any named or class party hereto, and no sanctions imposed against the Commonwealth, its officials and employees, in the event that a Referee has not issued a final decision in any closed case subject to this paragraph within the prescribed sixty (60) day period; provided further that the Commonwealth, its officials and employees, do not waive any defense or immunity under law. The Bureau shall direct all referees that issuing a final decision on the merits in closed cases subject to this paragraph has priority over issuing decisions in all other cases, except decisions on supersedeas issues.

VII. *IDENTIFICATION OF PLAINTIFF CLASS MEMBERS WHOSE BENEFITS WERE TERMINATED UNDER THE AUTOMATIC SUPERSEDEAS PROVISIONS OF SECTION 413(a) AS A RESULT OF PETITIONS FILED AFTER FEBRUARY 1, 1984*

20. Within thirty (30) days following the notice of the proposed class action settlement, each named and class defendant, insurance carrier, and self-insured employer that has terminated the workers' compensation benefits of an individual under the automatic supersedeas provision of section 413(a) as a result of a termination petition filed with the Bureau after February 1, 1984 based upon a medical affidavit or an allegation of return to work shall conduct a review of all its pertinent files and records and shall prepare a form for all such claimants so terminated. The form shall be in the form attached hereto and marked Exhibit "E". Copies of each such form shall be transmitted to the Bureau and plaintiffs' counsel within thirty (30) days of the date of the notice of the proposed class action settlement and shall be updated periodically to reflect any additional automatic supersedeas invoked following the date the forms are submitted until the date of the order terminating the court's jurisdiction.

21. Within thirty (30) days following the court's tentative approval of the Decree, the Bureau shall conduct a review of all its pertinent files and records and shall prepare a list of all plaintiff class members whose benefits were terminated under the automatic supersedeas provisions of section 413(a) as a result of termination petitions filed on or after February 2, 1984.

A copy of the list so developed shall be promptly transmitted to plaintiffs' counsel. The list shall contain, at a minimum, the name, address and social security number of the claimant, the identity of the insurance carrier or self-insured employer that filed the termination pctition, the rate of weekly (or other) compensation benefits, the date the termination petition was filed, and an indication as to whether there was attached to the petition a physician's affidavit of recovery or whether the petition contained an allegation that the claimant returned to work at pre-injury or greater wages.

VIII. *REPORTING REQUIREMENTS*

22. At the same time the Bureau transmits to the parties and counsel of record in the pending proceedings before the referee copies of the Special Supersedeas Hearing notices, it shall forward a copy of each such notice to counsel for plaintiffs herein.

23. At the same time the Bureau transmits to the parties and counsel of record in the pending proceedings before the referee the supersedeas decisions required by this Decree, it shall forward a copy of each such decision to counsel for plaintiffs herein.

24. Within thirty (30) days of the date of circulation of each supersedeas decision required by this Decree, each named and class defendant insurance carrier and self-insured employer shall file with the Bureau and transmit to plaintiffs' counsel a certificate verifying its compliance with the referee's supersedeas decision. The certificate so required shall be in the form attached hereto and marked Exhibit "F".

25. Within thirty (30) days of the date required to resume the payment of benefits for the failure of a referee to issue a timely supersedeas decision required by this Decree, each named and class defendant insurance carrier and self-insured employer shall file with the Bureau and transmit to plaintiffs' counsel a certificate verifying that the payment of benefits has been resumed. The certificate so required shall be in the form attached hereto and marked Exhibit "G".

IX. *ATTORNEYS' FEES AND COSTS*

26. Plaintiffs' counsel is entitled to a reasonable award of attorneys' fees and costs for all services and costs reasonably and necessarily incurred in the prosecution of this litigation in accordance with the provisions of the Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988, *as amended.* Counsel for plaintiffs shall prepare a schedule of fees and costs so incurred, in accordance with the lodestar method of calculation, and without multipliers, and shall submit the schedule to a committee of counsel selected by named defendants. It is the intent of the parties to amicably negotiate reasonable fees and costs for plaintiffs' counsel, and only if agreement is not achieved shall resort to the court be invoked.

27. The fees and costs awarded to plaintiffs' counsel under paragraph 26 of the Decree shall be paid proportionately by *each* named and class insurance carrier and self-insured employer member of the defendant class including S.W.I.F. The liability so incurred shall be paid by each such named defendant and defendant class member in accordance with the method

and in the exact proportion used by the Bureau in its assessment for the Workmen's Compensation Administration Fund in the year 1983. The Bureau shall send a written Notice of Assessment to all members of the defendant class promptly after the court's approval of the fees and costs advising them of their individual liabilities under section IX of the Decree. The named and intervening defendants shall be obligated to pay their individual share of plaintiffs' fees and costs within thirty (30) days of the court's final approval of the plaintiffs' fees and costs. All other insurance carriers and self-insured employers shall be obligated to pay their individual share of the plaintiffs' counsel fees and costs by check or draft made payable to Community Legal Services, Inc. within thirty (30) days of the date of the Bureau's Notice of Assessment, said payment to be transmitted to the Bureau which, in turn, shall transmit the payments so received directly to plaintiffs' counsel no later than fifteen (15) days thereafter.

28. The plaintiffs' fees and costs agreed to or awarded by the court under this section of the Decree shall not include services incurred or costs associated with any future enforcement or contempt activity necessitated on plaintiffs' behalf as a result of any violations of this Decree by any named or class defendant. Nor shall the plaintiffs' fees and costs agreed to or awarded by the court under this section include any sums incurred with respect to any appeals filed from the court's approval of the Decree, or with respect to the litigation associated with the severed claims to remedial relief requested by plaintiffs under paragraph 3 of the Decree.

X. *MISCELLANEOUS PROVISIONS*

29. No named party or its counsel shall in any way solicit or otherwise encourage objection to this Decree on the part of any class member or any other person.

30. If after notice and hearing, the Decree agreed upon by the parties is disapproved by the court, all parties shall retain their right to exercise their usual rights of appeal.

31. Except as a self-insured employer in meeting its obligations, if any, under the assessment provisions of Section 443(b) of The Workmen's Compensation Act, the Commonwealth of Pennsylvania shall not make any payments or reimbursements from general revenues to the Workmen's Compensation Supersedeas Fund.

XI. *NOTICES*

32. Notice of the court's tentative approval of the Decree, a copy of the Decree and a summary of the Decree's provisions shall be transmitted through the Bureau to each named and class defendant insurance carrier and self-insured employer, as well as to each member of the plaintiff class whose worker's compensation benefits have been or may have been terminated under the automatic supersedeas procedure of section 413(a) and for whom there has not yet been rendered a decision by a referee on the merits of the termination petition. These notice packages shall advise the members of the plaintiff and defendant classes of their right to file timely written objections to the Consent Decree and to be heard at a "fairness hearing" to be conducted by the court in accordance with Rule 23(e) of the Federal Rules of Civil Procedure. The notice

to the members of the plaintiff class shall be in the form attached hereto and marked Exhibit "H". The notice to the members of the defendant class shall be in the form attached hereto and marked Exhibit "J".

33. Any costs incident to providing notices to the plaintiff and defendant classes shall be paid by each named defendant and defendant class member in accordance with the method specified for allocation of plaintiffs' fees and costs described in paragraph 27.

XII. *RETENTION OF JURISDICTION*

34. The court shall retain continuing jurisdiction over this action in order to insure compliance by all parties with the terms and provisions of the Consent Decree. That jurisdiction shall terminate, either upon the court's own motion, or upon motion of any party, at such time as the court concludes that the rights and remedies accorded by the Decree have been satisfied.

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HAROLD I. GOODMAN
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Order (Preliminary Approval)

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 76-429.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, and CHARLES SAMUEL Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORPORATION, and all other insurance carriers and/or self-insured employers similarly situated,

Defendants.

Filed May 14, 1984.
ENTERED: 5-15-84.

Order (Preliminary Approval).

ORDER

On April 27, 1984, the parties jointly moved for preliminary approval of a consent decree and for approval of transmission of notice of the settlement to members of the plaintiff and defendant classes. Upon consideration of that motion, the memorandum in support thereof, and the proposed consent decree, the court determined that it could not preliminarily approve the consent decree as drafted. However, the court determined that it could preliminarily approve the proposed consent decree if paragraph 2, on page 6 of the proposed decree, were amended to read: "It is specifically understood by and among the parties that the Decree (as distinct from the various opinions of the Court in this matter) shall not have any precedential impact in any litigation save this one."

On the afternoon of May 8, 1984, Judge Pollak held a telephone conversation with Patricia Mattern, Esq., Debra Wallet, Esq., and Harold Goodman, Esq. Ms. Mattern represented that she and Lowell Reed, Esq., who both represent Bituminous Casualty Corporation, had been able to contact all counsel other than counsel for the State Workmen's Insurance Fund and Ms. Mattern further represented that she had authority to act on all private defendants' behalf. Judge Pollak explained the court's suggested amendment at that conference. On May 10, Ms. Mattern, Ms. Wallet, and Mr. Goodman contacted Judge Pollak's chambers to represent that all parties, including SWIF, had agreed to the amendment of paragraph 2.

Accordingly, IT IS ORDERED that:

1. The proposed consent decree, amended as described below, is preliminarily APPROVED since it appears to be, at this stage of the proceedings, a fair, adequate, and reasonable resolution of the litigation. This approval extends to the proposed Consent Decree as filed on April 27, 1984, with paragraph 2 amended to read: "It is specifically understood by and among the parties that the Decree (as distinct from the various opinions of the Court in this matter) shall not have any precedential impact in any litigation save this one."

2. Transmittal of notice of the Decree by the Bureau of Workers' Compensation to members of the plaintiff and defendant classes is APPROVED. The form and content of the respective class notices, as set forth in exhibits H and J to the Decree, with appropriate insertions of dates, are also APPROVED.

3. The Bureau of Workers' Compensation ("Bureau") shall transmit the proposed Consent Decree as amended and class notices to members of the plaintiff and defendant classes by regular mail as promptly as possible, and in any event no later than ten (10) days after the date of the entry of this Order. The Bureau shall file with the Clerk of Court a notarized affidavit, with copies served on counsel of record, attesting to the transmission of these documents to members of the plaintiff and defendant classes.

4. Written objections, if any, to the proposed Decree and the plaintiffs' proposed resolution of the unsettled issue, identified in paragraph 3 of the Decree, if any, must be filed with the Clerk of Court within thirty (30) days of the date of this Order, i.e., on or before June 13,

1984. Any such filings should briefly but clearly state the basis for the objection presented.

5. The court will hold a fairness hearing on June 18, 1984 (i.e., thirty-five days after the date of this Order) at 8:45 a.m., in Courtroom 13B to consider whether to grant final approval to the proposed Decree, and to consider the resolution of the unsettled issue identified in paragraph 3 of the Decree. At this hearing, any member of the plaintiff or defendant class, or the class member's counsel, who has filed a timely written objection to the Decree, may present to the court the basis for any such objection, or such other comments as the court may deem to be relevant and material to its consideration whether to grant final approval to the Decree and to its resolution of the unsettled issue identified in paragraph 3 of the Decree.

6. Counsel for the moving parties to the Joint Motion may respond at the fairness hearing to any objections or comments presented to the Decree. Further, these counsel shall be permitted to file written responses, to the extent deemed necessary and at such time as determined by the Court, to the objections and/or comments raised by any class member at the fairness hearing.

ARLIN M. ADAMS
ARLIN M. ADAMS, *Circuit Judge*

CLIFFORD SCOTT GREEN
CLIFFORD SCOTT GREEN, *District Judge*

LOUIS H. POLLAK
LOUIS H. POLLAK, *District Judge*

May 14, 1984

Appearance (Objecting Defendants) Dated June 6, 1984

SWARTZ, CAMPBELL & DETWEILER
BY: R. D. Harburg, Esquire
Identification No. 03966
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Philadelphia, Pa. 19110
(215) 564-5190

Attorney For

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 76-429.

RICHARD BAKSALARY et al.,

v.

PAUL J. SMITH et al.

Filed June 6, 1984; MICHAEL E. KUNZ, Clerk.
By (Illegible) Dep. Clerk.

ENTRY OF APPEARANCE

TO THE CLERK OF COURT:

Kindly enter our appearance on behalf of some and several of the members of defendant class, in the above captioned action, who are neither named nor have previously intervened, including Aetna Fire Underwriters Insurance Company, Aetna Insurance Company, Argonaut Insurance Company, B P Oil Company, Inc.,

Appearance (Objecting Defendants) Dated June 6, 1984.

Bankers Standard Insurance Company, The Budd Company, Century Indemnity Company, CIGNA Insurance Company, Commercial Union Insurance Company (American Employers Insurance Company, The Employers Fire Insurance Company, and The Northern Assurance Company of America), Firemans Fund Insurance Company (American Automobile Insurance Company of Illinois, Associated Indemnity Corp. and Firemans Fund Insurance Company of Wisconsin), Harleysville Mutual Insurance Company, Indemnity Insurance Company of North America, Insurance Company of North America, Ohio Casualty Group of Insurance Companies, Pacific Employers Insurance Company, Reliance Insurance Company, (Planet Insurance Company and United Pacific Insurance Company), Royal Insurance Company and Wausau Insurance Companies, in order to preserve objections to the entire constitutional determination by the Court in its Opinion, dated February 1, 1984, and desiring to now comment on the proposed settlement encompassed in Consent Decree.

R. D. HARBURG
R. D. HARBURG, Esquire
SWARTZ, CAMPBELL & DETWEILER

Statement/Objections (Objecting Defendants)

SWARTZ, CAMPBELL & DETWEILER
By: R. D. Harburg, Esquire
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Philadelphia, Pa. 19110
(215)564-5190

FILED
JUN 06 1984
Michael E. Kunz, Clerk
By (Illegible) Dep. Clerk

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

RICHARD BAKSALARY, *et al.*,

v.

PAUL J. SMITH, *et al.*

Civil Action No. 76-429.

STATEMENT/OBJECTIONS

R. D. Harburg, Esquire, and with him Swartz, Campbell & Detweiler, Esquires, as counsel to and for some and several of the members of defendant class who are neither named nor have previously intervened including Aetna Fire Underwriters Insurance Company, Aetna Insurance Company, Argonaut Insurance Company, B P Oil Company, Inc., Bankers Standard Insurance Company, The Budd Company, Century Indemnity Company, CIGNA Insurance Company, Commercial Union Insurance Company (American Employers Insurance Company, The Employers Fire Insurance Company and The Northern Assurance

Company of America), Firemans Fund Insurance Company (American Automobile Insurance Company of Illinois, Associated Indemnity Corp. and Firemans Fund Insurance Company of Wisconsin), Harleysville Mutual Insurance Company, Indemnity Insurance Company of North America, Insurance Company of North America, Ohio Casualty Group of Insurance Companies, Pacific Employers Insurance Company, Reliance Insurance Company (Planet Insurance Company and United Pacific Insurance Company), Royal Insurance Company and Wausau Insurance Companies, in order to preserve objections to the entire constitutional determination by the Court in its Opinion, dated February 1, 1984, and desiring to now comment on the proposed settlement encompassed in Consent Decree, files the instant written statement in the form of Objections pursuant to Paragraph 4 of the Order of Court dated May 14, 1984 and "Settlement Procedure" as set forth in Article I of Exhibit "J".

I. *PRE-FEBRUARY 2, 1984 AUTOMATIC SUPERSEDEAS*

The procedure set forth for injunctive relief for pre-February 2, 1984 automatic supersedeas in Article V of the proposed Consent Decree is unduly complicated, burdensome and unnecessary.

It is suggested, and indeed urged that the same or substantially similar result can be accomplished in far simpler and more expeditious manner without the need of monitoring by counsel for plaintiff or retention of jurisdiction by the Court.

Rather than provide for "Special Supersedeas Hearings", this Court could simply order that in any case pending before a Hearing Referee, where automatic supersedeas has been effected on the basis of physician's affidavit of full recovery, then, with both parties having the right to present evidence bearing on the supersedeas issue, at the next regularly scheduled hearing, but in no event more than 90 days from this Court's final Order, the Referee (who, within that time, ordinarily would have held a regular hearing on almost every case assigned to him anyhow), shall determine whether any such supersedeas is or is not to remain in effect.

The Referee's order can be made on a form similar to the one already in use for Request for Supersedeas, and any ruling of ineffectiveness of a particular supersedeas could then result in reinstatement of benefits due with statutory interest, and continuing payment of compensation benefits as would have been required absent taking of automatic supersedeas in the first instance.

II. *POST-FEBRUARY 1, 1984 AUTOMATIC SUPERSEDEAS*

Declaring in paragraph 3 of Article II of the proposed Consent Decree that it "does *not* resolve" the issue of post-February 1, 1984 automatic supersedeas, and reserving this for "litigated judgment" is inexplicable, improvident and unfair.

If, after eight years of litigation, the named parties have arrived at a proposed settlement which the Court has preliminarily approved, it seems inexplicable that such settlement should except petitions filed after the

Opinion of Court on February 1, 1984 and prior to the Court's Declaratory Order of March 15, 1984.

It was only as of March 15, 1984 that any of the members of either class were favored with a formal order which, at that time, specifically stated:

> "Any invocation by any defendant of the automatic supersedeas provision *after this date* in order to terminate an individual's worker's compensation benefits without prior notice or a pre-termination opportunity to be heard is hereby Declared to be a deprivation of that individual's property without due process of law". (Emphasis supplied)

Surely, it was only after March 15, 1984 then, that any class member or their counsel could reasonably have been expected to be subject to any formal prohibition against seeking automatic supersedeas by Petition for Termination based on a physician's affidavit of full recovery.

It is therefore urged to be improvident and unfair to suggest that there is either reason or need to treat differently automatic supersedeas taken prior to February 1, 1984, and any of those that may have been taken between February 1, 1984 and March 15, 1984.

The procedure suggested above for pre-February 2, 1984 automatic supersedeas would apply equally well and fairly to supersedeas taken between February 1, 1984 and March 15, 1984, and thereby would avoid unnecessarily prolonging already extended litigation, and now drawing into this litigation other members of the class who did not previously have the benefit of participation.

Statement/Objections (Objecting Defendants).

Certainly, preferred disposition would be to treat all cases of automatic supersedeas up to the Court's Declaratory Order of March 15, 1984 in the same fashion thereby obviating any additional litigation and any alternative procedure that would simply introduce unnecessary elements of expense and confusion.

Verification of compliance can of course be perfectly well accomplished by the Pennsylvania Workmen's Compensation Bureau utilizing its own in-place personnel and procedures.

III. *RETURN TO WORK AT PRIOR OR INCREASED EARNINGS*

As a proposed Order that fails to differentiate between automatic supersedeas taken on the basis of physician's affidavit of full recovery as against automatic supersedeas on the basis of return to work without loss of earning power in Articles III, IV and V, the Consent Decree is unreasonable, inappropriate and unfair.

While it would appear that throughout the proceedings as described of record, the Court has been directing its attention to that portion of Section 413(a) of the Pennsylvania Workmen's Compensation Act, which deals with automatic supersedeas either on the basis of physician's affidavit or on the basis of a return to work, still, a reading of the Court's own Opinion, and in particular Judge Adams' Concurring Opinion, joined in specifically by Judges Green and Pollak, certainly suggests that the Court's principal concern lay with the fact that: (Concurring Opinion 2/1/84, P. 5, 8—Emphasis supplied)

Statement/Objections (Objecting Defendants).

"First, the statute imposes no requirement of notice to the employee prior to termination", and

"The second deficiency in the Pennsylvania arrangement is that it provides no independent check by state authorities on the *termination certification by a physician.*"

Indeed, in the case referred to and relied upon, *Auxier v. Woodward State Hospital-School,* 266 N.W.2d 139 (1978) *cert. denied.*, 429 U.S. 830 (1979), the Supreme Court of Iowa in turn *"relying on Mathews" (Mathews v. Eldridge,* 424 U.S. 319 (1976)) specifically excepted from its declaration of what due process demands, those cases *"where the claimant has demonstrated recovery by returning to work".* (P. 142—Emphasis supplied—as cited by Adams, J. Concurring Opinion 2/1/84. P. 7)

Pennsylvania is, of course, a "loss of earnings state" such that payment of workmen's compensation disability benefits is intended only where an employee is, in fact, suffering a loss of earnings by reason of a work connected injury (except for certain "scheduled losses"). It would therefore be entirely inappropriate, if not to say destructive of the system, to suggest that an employer has any ongoing obligation for payment of compensation benefits once an employee has returned to work at regular wage.

Requiring continuing payment of disability benefits to an employee who has resumed employment at equivalent or greater wage would not only make for an absolutely unintended, improvident favoring of the injured employee over one who is not injured, but would, we suggest, in fact constitute a decidedly more grave

unconstitutional taking of property without due process of law visited upon the defendant class than that which is said to be the basis for the case in chief on behalf of the plaintiff class.

This Court has, of course, already excluded from consideration those cases of automatic supersedeas "no longer pending before the Bureau of Workers' Compensation or any other tribunal on (February 1, 1984)" (Order 3/15/84, P. 7) thus evidencing that its final Order need not be all inclusive. It is therefore urged that the Court now specifically differentiate as between automatic supersedeas on the basis of physician's affidavit of full recovery, and automatic supersedeas on the basis of return to work at prior or increased earnings, and confine its Order to the former situation only.

By excluding from a final Order any prohibition against stoppage of payment of disability benefits to an employee who has returned to work without loss of earnings, and by treating all cases of automatic supersedeas, based on physician's affidavit, up to its Order of March 15, 1984, in the same manner, and by having the efficacy of such automatic supersedeas based on physician's affidavit determined at a regularly scheduled Referee's hearing, the Court will thereby avoid the inequity, unfairness and unnecessarily burdensome complications that would otherwise result.

Respectfully submitted,

BY R. D. HARBURG
R. D. HARBURG, ESQUIRE
SWARTZ, CAMPBELL & DETWEILER

Appearance (Objecting Defendants) Dated June 11, 1984

SWARTZ, CAMPBELL & DETWEILER
BY: R. D. Harburg, Esquire
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IN THE UNITED STATES DISTRICT COURT
For The Eastern District of Pennsylvania

Civil Action No. 76-429.

RICHARD BAKSALARY,

v.

PAUL J. SMITH, *et al.*

Filed Jun 11 1984; MICHAEL E. KUNZ, Clerk.
By (Illegible) Dep. Clerk.

ENTRY OF APPEARANCE

TO THE CLERK OF COURT:

Kindly enter our appearance on behalf of the following additional members of defendant class in the above captioned action: Travelers Insurance Company, Travelers Indemnity Company, Travelers Indemnity Company of America, Travelers Indemnity Company of Rhode Island, Charter Oak Fire Insurance Company, Phoenix Insurance Company and Nippon Fire & Marine Insurance Co., Ltd., U.S. Branch, in order to preserve

Appearance (Objecting Defendants) Dated June 11, 1984.

objections to the entie constitutional determination by the Court in its Opinion, dated February 1, 1984, and desiring to now comment on the proposed settlement encompassed in Consent Decree.

R. D. HARBURG
R. D. HARBURG, Esquire
SWARTZ, CAMPBELL & DETWEILER

Appearance (Objecting Defendants) Dated June 12, 1984

SWARTZ, CAMPBELL & DETWEILER
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IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 76-429.

RICHARD BAKSALARY, *et al.*,

v.

PAUL J. SMITH, *et al.*

Filed Jun 13 1984; MICHAEL E. KUNZ, Clerk.
By (Illegible) Dep. Clerk.

ENTRY OF APPEARANCE

TO THE CLERK OF COURT:

Kindly enter our appearance on behalf of the following additional members of defendant class in the above captioned action: Allstate Insurance Company (Allstate Indemnity Company, Northbrook Indemnity Company, Northbrook National Insurance Company, Northbrook Property & Casualty Insurance Company); C. & F. Underwriters Group (North River Insurance Company, United States Fire Insurance Company, International Insurance Company, West Chester Fire Insurance

Appearance (Objecting Defendants) Dated June 12, 1984.

Company, Industrial Indemnity Insurance Company); Sun Company, Inc. and its affiliate and subsidiary companies, in order to preserve objections to the entire constitutional determination by the Court in its Opinion, dated February 1, 1984, including any question or issue as to "notice" for these parties, as for all other parties identified in prior entries of appearance by instant counsel, and desiring to now comment on the proposed settlement encompassed in Consent Decree.

R. D. HARBURG
R. D. HARBURG, Esquire
SWARTZ, CAMPBELL & DETWEILER

Order—Circuit Court Stay of Proceedings

#C-53

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 84-1506

Baksalary, et al. vs. Smith, etc., et al.
Allstate Insurance Co., et al., Appellants
(E.D. Pa. Civil 76-429)

October 19, 1984

Present: WEIS and GARTH, *Circuit Judges.*

1. Appellant's motion for stay of proceedings pending determination of any jurisdictional issue by the Supreme Court,
2. Appellants' motion to defer briefing until forty (40) days from any subsequent order requiring that this appeal proceed,
3. Letter dated September 28, 1984, from appellee, Liberty Mutual Insurance Co., advising that he does not intend to file an answer to appellants' motion for stay of proceeding or motion to defer briefing,
4. Letters dated September 28, 1984, from appellee, Bituminous Casualty Corp., advising that he takes no position with regard to appellants' motions,
5. Responses of appellees, Richard Baksalary, et al., in opposition to appellants' motions,
6. Letter dated October 3, 1984, from appellee, PA Manufacturers Assoc. Ins. Co., advising that he takes no position with regard to appellants' motions,
7. Letter dated October 2, 1984, from "Commonwealth" appellees, advising that they take no position on appellants' motions,

Order—Circuit Court Stay of Proceedings.

8. Letter dated October 4, 1984, from appellee, School District of Phila., advising that they do not intend to file an answer to appellants' motions,
9. Letter dated October 3, 1984, from appellee, State Workmen's Ins. Fund, advising that he does not intend to file an answer to appellants' motions,
10. Letter dated October 12, 1984, from appellee, American Mutual Ins. Co., advising that she does not take any position on appellants' motion to stay,

in the above-entitled case.

Respectfully,

(Illegible)
Deputy Clerk 7-5019

ad
enc.

The foregoing Motion for stay pending determination of jurisdictional issue by the Supreme Court is granted. Appellants motion to defer briefing is granted.

Appellant shall notify the Clerk within five days of the entry of an order by the Supreme Court.

By the Court,
WEIS, *Judge.*

Dated: October 29, 1984

dt/cc: RDH
JRT (LAR,Jr., PAM)
HIG ACW
CJP WCS
RHN PBG

Designation of Corporate Relationships

ALLSTATE INSURANCE COMPANY

PARENT COMPANY:	Sears, Roebuck & Company
SUBSIDIARIES: (non-wholly owned)	Underwriters Syndicate Management, Inc. Allstate Insurance Company of Canada Kro-Mar Associates Limited Partnership
AFFILIATES:	Sears Canada, Inc. Sears Roebuck Servicos de Chile Limitada Sears, Roebuck De Mexico, S.A. de C.V. Universal—Rundle Corporation

ARGONAUT INSURANCE COMPANY

PARENT COMPANY:	Peledyne
SUBSIDIARIES: (non-wholly owned)	None
AFFILIATES:	None

HARLEYSVILLE INSURANCE COMPANY

PARENT COMPANY:	None
SUBSIDIARIES: (non-wholly owned)	Harleysville Insurance Company, U.K. Ltd.
AFFILIATES:	None

Designation of Corporate Relationships.

OHIO CASUALTY GROUP OF INSURANCE COMPANIES

PARENT COMPANY:	Ohio Casualty Corp.
SUBSIDIARIES: (non-wholly owned)	Ohio Casualty Insurance Company West American Insurance Company Ohio Security Insurance Company
AFFILIATES:	None

ROYAL INSURANCE COMPANY

PARENT COMPANY:	Royal Group, Inc.
SUBSIDIARIES: (non-wholly owned)	None
AFFILIATES:	Royal Indemnity Company Globe Indemnity Company Newark Insurance Company American and Foreign Insurance Company Safeguard Insurance Company Silvey Corporation Royal Life Insurance Company of America Royal Life Insurance Company of New York Commercial Marketing Systems, Inc. Milbank Insurance Company Royal Lloyd's of Texas B.E.I. Services, Inc. U.S. Transportation Underwriters, Inc. Royal Excess and Special Risks of Georgia, Inc. Shield Intermediaries, Inc.

Designation of Corporate Relationships.

	Royal Excess and Special Risks, Inc. Royal Excess and Special Risks Insurance Services, Inc. Royal Excess and Special Risks of Illinois, Inc. Tri-State Insurance Company Farmers and Merchants Insurance Company Midwestern Insurance Company New American Life Insurance Company KIM Management & Investment Company

SUN COMPANY, INC.

PARENT COMPANY:	None
SUBSIDIARIES: (non-wholly owned)	None
AFFILIATES:	Mid-Valley Pipeline Company SunOlin Chemical Company

TRAVELERS INSURANCE COMPANY

PARENT COMPANY:	Travelers Corporation
SUBSIDIARIES: (non-wholly owned)	Travelers Hill Samuel, Inc. Caribbean Atlantic Life Insurance Company of Trinidad and Tobago Travelers Life Insurance Company Overseas Limited Terra Nova Metro Pole Travelers Assurance Management International Corporation

Designation of Corporate Relationships.

London & Hartford Company
Travelers American Real Estate Corporation Limited
Travelers United States Property Bermuda Limited
Travelers Corporation of Asia Limited

AFFILIATES: None

WAUSAU INSURANCE COMPANIES

PARENT COMPANY: None (Wausau Insurance Companies is trade name for Employees Insurance of Wausau, A Mutual Company)

SUBSIDIARIES: (non-wholly owned) None

AFFILIATES: None

ORIGINAL

Supreme Court, U.S.
FILED
DEC 17 1984
ALEXANDER L. STEVAS
CLERK

NO. 84-768

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ALLSTATE INS. COMPANY, ARGONAUT INS. COMPANY, HARLEYSVILLE INS. COMPANY, OHIO CASUALTY GROUP OF INS. COMPANIES, ROYAL INS. COMPANY, SUN COMPANY, INC., TRAVELERS INS. COMPANY and WAUSAU INS. COMPANIES,

Appellants/Objecting Members of Defendant Class,

vs.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, CHARLES SAMUEL, Individually and on behalf of all others similarly situated,

Appellees/Plaintiffs,

and

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS ASSOC. INS. COMPANY, AMERICAN MUTUAL LIABILITY INS. COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORP. and all other insurance carriers and/or self-insured employers similarly situated,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO DISMISS OR AFFIRM

HAROLD I. GOODMAN *
LORALYN McKINLEY
Counsel for Individual and Class Appellees

Community Legal Services, Inc.
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(215) 893-5354

* (Counsel of Record)

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NO. 84-768

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ALLSTATE INS. COMPANY, ARGONAUT INS. COMPANY, HARLEYSVILLE INS. COMPANY, OHIO CASUALTY GROUP OF INS. COMPANIES, ROYAL INS. COMPANY, SUN COMPANY, INC., TRAVELERS INS. COMPANY and WAUSAU INS. COMPANIES,

Appellants/Objecting Members of Defendant Class,

vs.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, CHARLES SAMUEL, Individually and on behalf of all others similarly situated,

Appellees/Plaintiffs,

and

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS ASSOC. INS. COMPANY, AMERICAN MUTUAL LIABILITY INS. COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORP. and all other insurance carriers and/or self-insured employers similarly situated,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO DISMISS OR AFFIRM

Appellees, class plaintiffs and prevailing parties below, respectfully move the Court pursuant to Rule 16 to dismiss the appeal in this case for want of jurisdiction, Rule 16.1(a), or alternatively, to summarily affirm the judgment below on the ground that the questions presented are so unsubstantial, in light of the factual findings of the district court and its application of the governing legal precepts, as not to warrant any further argument. Rule 16.1(c).

OPINIONS BELOW

The liability opinion of the three-judge district court is reported at 579 F. Supp. 218 (E.D. Pa. 1984); that opinion and the court's accompanying order are reproduced in the Appendix to the Jurisdictional Statement at 36a - 83a (hereafter "App. at ___"). The district court's subsequent opinion approving a classwide Consent Decree and resolving, in plaintiffs' favor, a single unsettled issue, is reported at 591 F. Supp. 1279 (E.D. Pa. 1984); that opinion and the court's implementing orders are reproduced at App. 1a - 35a.

STATEMENT OF THE CASE

This is a direct appeal filed by eight members of a defendant class of insurance carriers and self-insured employers from an order of a three-judge district court approving a comprehensive Consent Decree that settled the remedial issues in this lawsuit which successfully challenged the constitutionality of the "automatic supersedeas" provision of section 413(a) of Pennsylvania's Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, § 774 (Purdon Supp. 1984). 1/

The complaint was filed on February 13, 1976 in the United States District Court for the Eastern District of Pennsylvania. Plaintiffs claimed that section 413(a)'s automatic supersedeas procedure denied them due process of law by authorizing insurance carriers and self-insured employers to terminate the payment of their workers' compensation benefits -- including the termination of both compensation checks and incurred medical expenses -- without any notice or opportunity to be heard.

1/ The automatic supersedeas procedure challenged by plaintiffs is contained in the first sentence of the fourth paragraph of section 413(a). It provides:

> The filing of a petition to terminate or modify a notice of compensation payable or a compensation agreement or award as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require only when such petition alleges that the employe has returned to work at his prior or increased earnings or where the employe has fully recovered and is accompanied by an affidavit of a physician on a form prescribed by the [Bureau of Workers' Compensation] to that effect which is based upon an examination made within fifteen days of the filing of the petition.

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Pursuant to 28 U.S.C. § 2281, 2/ a special three-judge district court was convened to consider and determine the merits of plaintiffs' claims. 3/ In 1978, on plaintiffs' motion, the court entered an order under Rule 23(b)(2) of the Federal Rules of Civil Procedure permitting the action to proceed as both a plaintiffs' and defendants' class action. On the plaintiffs' side, the class was defined to include all persons whose benefits had been terminated, or whose benefits were in the future terminated, under section 413(a)'s automatic supersedeas procedure. On the defendants' side, the class was defined to include all insurance carriers and self-insured employers authorized to issue workers' compensation insurance in Pennsylvania and which terminated the payment of plaintiffs' benefits, or did so in the future, under the automatic supersedeas procedure contained in section 413(a).

Following a lengthy period of discovery, the parties submitted the case to the three-judge court through a comprehensive series of factual stipulations and accompanying exhibits. 4/

2/ Subsequent to the filing of the complaint in this case, Congress repealed section 2281. See Pub. L. 94-381, 90 Stat. 1119. However, as noted by the district court (App. at 2a), section 2281 still applies to cases filed before its repeal. Accord Cabell v. Chavez-Salido, 454 U.S. 432, 435 n. 5 (1982), Vitek v. Jones, 445 U.S. 480, 485 n. 4 (1980).

3/ The members of the court initially included the Honorable Arlin M. Adams, Circuit Judge of the United States Court of Appeals for the Third Circuit, the Honorable Herbert A. Fogel and the Honorable Clifford Scott Green, District Judges of the United States District Court for the Eastern District of Pennsylvania. In 1978, the Honorable Louis H. Pollak was assigned the case to replace Judge Fogel who had left the bench.

4/ These stipulations were executed and submitted by the named parties and an intervening defendant, Liberty Mutual Insurance Company. The named plaintiffs originally included six workers whose benefits had been terminated under section 413(a)'s automatic supersedeas procedure. Two of these plaintiffs were subsequently dismissed from the case by stipulation. The named defendants included four state officials responsible for the administration of Pennsylvania's Workmen's Compensation Act, as well as three state-licensed insurance carriers, one self-insured public school district, and the statutorily created and state-run State Workmen's Insurance Fund -- each of which had terminated plaintiffs' benefits under the automatic supersedeas procedure of section 413(a).

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After reviewing the record and considering the briefs and oral argument of counsel, the court issued its liability opinion on February 1, 1984. It concluded that:

> [the] operation of the automatic supersedeas authorized by section 413 of the Pennsylvania Workmen's Compensation Act involves conduct reasonably attributable to the state and that section 413 does not accord worker's compensation recipients due process.

App. at 71a - 72a. 579 F. Supp. at 233. 5/

After the liability opinion was issued, the parties submitted proposed forms of injunctive orders, as well as supporting briefs, for the district court's consideration. In those submissions, all parties recognized that, at a minimum, a declaratory judgment was necessary to implement the court's constitutional holding. Consequently, on March 15, 1984 a declaratory judgment was issued by the court with an accompanying memorandum opinion. App. at 91a - 101a. Oral argument was then scheduled on the remaining remedial issues raised by the parties in their proposed injunctive decrees.

On the day set for oral argument, the named parties agreed in principle to the entry of a Consent Decree that was intended to fully settle the litigation. They so advised the court, which granted them leave to draft the language of the Decree and secure the approval of their respective clients.

5/ The district court's opinion was written by Judge Pollak who was joined by both Judges Adams and Green. In addition, Judge Adams wrote a concurring opinion in which he highlighted the due process deficiencies of the automatic supersedeas procedure. App. at 73a - 81a. 579 F. Supp. at 233-237. Judges Pollak and Green joined in the concurring opinion of Judge Adams.

On April 27, 1984, the named parties (including intervening defendart Liberty Mutual Insurance Company) submitted a proposed Consent Decree to the district court with a joint motion for its preliminary approval. That Decree embodied the parties' intention to settle finally and in full all the remedial issues in the case save one. 6/ By order of May 14, 1984, the district court preliminarily approved the proposed Decree and authorized the transmission of extensive notice packages to all known members of both the plaintiff and defendant classes.

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the district court afforded class members until June 13, 1984 to submit written comments or objections to the proposed Consent Decree. 7/ It also scheduled a "fairness hearing" for June 18, 1984 to consider the remarks and objections of the named and class parties.

At the fairness hearing, a relatively small number of objectors appeared and made oral presentations in opposition to the Consent Decree. In addition, several defendants interposed objections to the relief sought by plaintiffs for class members whose benefits had been terminated under the automatic supersedeas

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6/ That one issue involved the question of the relief to be afforded members of the plaintiff class whose benefits had been terminated under section 413(a)'s automatic supersedeas procedure between the issuance of the Court's February 1, 1984 liability opinion and its declaratory judgment of March 15, 1984. Since the named defendants represented to the district court that they had not so terminated any member of the plaintiff class, they did not believe it was appropriate to take a position, one way or the other, on that issue. Consequently, the parties agreed to submit that question to the court for disposition, but only after notice and an opportunity to be heard was provided the unnamed members of the defendant class.

7/ The district court also afforded the non-named members of the defendant class until June 13, 1984 to comment on or object to the relief sought by plaintiffs on behalf of workers whose benefits had been terminated under the automatic supersedeas procedure between February 1 and March 15, 1984. That question represented the unsettled issue which the parties had agreed to submit for a litigated judgment. See n. 6 supra.

procedure in the period February 1 to March 15, 1984. [8] After its consideration of those objections, and the responses of the named parties to them, the court took the case under advisement. [9]

On July 30, 1984 the district court filed an opinion and accompanying order in which it granted final approval to the Consent Decree, as well as granting plaintiffs the relief they had sought for class members whose benefits had been terminated in the February 1 - March 15, 1984 period. App. at 1a - 32a. [10] 591 F. Supp. 1280 et seq. Subsequently, appellants filed two

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8/ Appellants were among the several class defendants who filed Appearances in the district court after receiving notice of the Consent Decree. App. at 135a - 136a; 144a - 147a. While five of them submitted written objections to the Decree (App. at 137a - 143a), all eight appeared through the same counsel and objected to the settlement at the fairness hearing. None, however, sought to intervene as a defendant, nor did any of them ever move the district court to reconsider or vacate its constitutional ruling.

9/ In response to a question raised at the fairness hearing by several unnamed members of the defendant class as to whether the Consent Decree entitled any plaintiff who had returned to work without a loss of earnings to the simultaneous receipt of both compensation payments and wages, plaintiffs indicated that no such result was contemplated or intended by the Decree. Subsequent to the fairness hearing, a written statement to that effect was submitted by the named parties and one unnamed defendant class member. App. at 18a - 19a. That statement was adopted by the district court in its opinion granting approval to the Consent Decree. Id.

10/ An order amending the July 30, 1984 opinion was issued by the district court on August 13, 1984. App. at 33a - 35a.

notices of appeal from the order approving the Consent Decree, one to this Court and one to the United States Court of Appeals for the Third Circuit. 11/

11/ Initially appellants sought a stay of the Consent Decree from the district court pending disposition of their appeals to the Third Circuit and this Court. By order filed on September 24, 1984, the district court denied that motion.

In the Court of Appeals, appellants moved not for a stay of the Consent Decree, but rather for a stay of proceedings in that court pending disposition of the jurisdictional issue by this Court. On October 29, 1984 an order granting a stay of proceedings was issued by the Third Circuit. However, on October 23, 1984 -- while their motion for a stay of proceedings was still pending -- appellants filed their brief on the merits in the Circuit Court. That brief was addressed solely to the propriety of the district court's constitutional holding of February 1, 1984. Since appellants had failed in their brief to address the one issue on which the Court of Appeals had jurisdiction, i.e. the propriety of the order approving the Consent Decree, plaintiffs moved the Third Circuit to strike appellants' brief and dismiss their appeal. By order dated November 26, 1984, the Court of Appeals denied the motion to strike and deferred the motion to dismiss to the merits panel of the court. The motion to dismiss is still pending.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS APPEAL

The sole issue presented by appellants in both this Court and the Third Circuit relates to whether the district court correctly held the automatic supersedeas procedure of section 413(a) to be unconstitutional. That issue, however, can neither be raised here nor in the circuit court since the litigation terminated with a court-approved Consent Decree to which appellants, as certified members of the defendant class, are bound. 12/ Moreover, appellants failed to appropriately raise the constitutional issue in the district court, by motion for reconsideration or otherwise. Consequently, the only permissible issue that appellants can raise on appeal, and even then they must raise it in the first instance in the Court of Appeals under 28 U.S.C. § 1291, is whether the district court abused its discretion, or misapplied governing legal precepts, in approving the Consent Decree. Carson v. American Brands, Inc., 450 U.S. 79 (1981). See also Blum v. Yaretsky, 457 U.S. 991, 1007 n. 17 (1982), Walsh v. Great Atlantic & Pacific Tea Co., Inc., 726 F.2d 956, 965 (3d Cir. 1983), Armstrong v. Board of School Directors, 616 F.2d 305, 313 (7th Cir. 1980), Patterson v. Stovall, 528 F.2d 108, 114 (7th Cir. 1976).

12/ See, e.g., Sam Fox Publishing Co. v. United States, 366 U.S. 683, 691-693 (1961) and Hansberry v. Lee, 311 U.S. 32, 41-43 (1940), respectively holding that members of a defendant class are bound by a Consent Decree (Sam Fox Publishing Co.) or litigated judgment (Hansberry) so long as they are adequately represented by the named defendants. Here, appellants have never challenged, nor could they, the adequacy of representation afforded them by the named defendants.

The very reason why litigants enter into settlements, by Consent Decree or otherwise, is to avoid a judicial determination of the merits of the underlying controversy. Carson v. American Brands, Inc., supra, 450 U.S. at 86-87, United States v. Armour & Co., 402 U.S. 673, 681 (1971). They do so because settlements avoid the time, expense and risk associated with further litigation. Id. For that reason, this Court, and the federal courts of appeals, have repeatedly refused to consider the merits of the underlying controversy on appeal of a district court order approving a settlement. Carson v. American Brands, Inc., supra, Swift v. United States, 276 U.S. 311, 324 (1928), Armstrong v. Board of School Directors, supra, 616 F.2d at 315, Patterson v. Stovall, supra, 528 F.2d at 114 ("[i]n determining whether to approve the compromise or not, the court does not try out the disputed issues. The compromise was agreed to for the purpose of avoiding just that").

If parties to a Consent Decree were permitted to appeal the merits of the underlying controversy, there would be no point in settling cases at all. Certainly there would be no point to settling, or even having class actions, if class members could choose, at their own discretion, to accept or reject a court-approved settlement. But Rule 23 was designed specifically to ensure that all class members would be bound, in a properly certified class action, to the resulting judgment of the court. See, e.g., Cooper v. Federal Reserve Bank of Richmond, 104 S. Ct. 2794, 2799 (1984), Califano v. Yamasaki, 442 U.S. 682, 700-701 (1979), Sosna v. Iowa, 419 U.S. 393, 403 (1975). A contrary conclusion would represent a return to the practice of "one-way" intervention, a practice explicitly abjured by the 1966 amendments to Rule 23. See Advisory Committee Note on Rule 23, 39 F.R.D. 98, 105 (1966). See also Developments in the Law - Class Actions, 89 Harv. L. Rev. 1318, 1340-1341 (1976).

These are not the only adverse consequences that would follow if appellants were permitted to directly appeal the district court's liability holding. Others would include a frustration of the judicial preference in favor of class action settlements, especially those affecting, as this one does, the public interest. See generally Airline Stewards & Stewardesses Assoc. v. T.W.A., 630 F.2d 1164, 1166-1167 (7th Cir. 1980), aff'd. sub nom. Zipes v. T.W.A., 455 U.S. 385 (1982), Armstrong v. Board of School Directors, supra, 616 F.2d at 312-313. Moreover, since this lawsuit was brought and certified under Rule 23(b)(2), the Rule by its terms, as well as through judicial construction, does not permit appellants to "opt-out" of the litigation as would be true in a Rule 23(b)(3) class. Walsh v. Great Atlantic & Pacific Tea Co., Inc., supra, 726 F.2d at 962-963, Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 248-250 (3d Cir.), cert. denied, 421 U.S. 1011 (1975). Cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (Rule 23(b)(3) class members must be afforded notice in order to permit them the right to opt-out of the suit). Finally, permitting appellants the right to appeal would frustrate the very reason why the parties negotiated and executed, and the district court approved, the settlement in this case: to avoid the risks of further litigation and to "finally and in full" settle all class claims which were or could have been raised in this litigation. Consent Decree, at ¶ 1 (App. at 113a). See also Opinion approving the Consent Decree, App. at 13a - 14a, 591 F. Supp. at 1285.

* * *

Since the merits of the district court's constitutional ruling cannot properly be raised on appeal, the Court lacks subject matter jurisdiction over the merits of the case. Just last Term, in Heckler v. Edwards, 104 S. Ct. 1532 (1984), the Court unanimously held that direct review does not lie under 28 U.S.C. § 1252 when the issue on appeal only involves the

district court's remedy order, not its underlying constitutional adjudication. Id., at 1541. In that instance, an appeal lies directly to the appropriate circuit court under 28 U.S.C. § 1291.

Appellants here seek to invoke the Court's mandatory jurisdiction under 28 U.S.C. § 1253, the companion to 28 U.S.C. § 1252. But they can no more do so than could the appellants in Heckler. Section 1253, like section 1252, has always been narrowly construed, Gonzales v. Automatic Employees Credit Union, 419 U.S. 90, 98 (1974), and restricted to those few cases where the three-judge district court's constitutional ruling was properly at issue. See, e.g., Gerstein v. Coe, 417 U.S. 279 (1974) (no jurisdiction under § 1253 over appeals from declaratory judgments); MTM, Inc. v. Baxley, 420 U.S. 799 (1975) (no jurisdiction under § 1253 over appeals from abstention orders); Gonzales, supra (no jurisdiction under § 1253 over appeals from orders dismissing complaints on standing grounds). This construction of the statute comports with congressional intent and is consistent with the "common sense view that the constitutional holding must be at issue for direct review in this Court to lie." Heckler, 104 S. Ct. at 1538. See also MTM, Inc., supra, 420 U.S. at 804 (same as to § 1253). 13/

The constitutional holding of the district court not properly being presented in this case, the only basis for invoking the Court's jurisdiction under section 1253 is therefore lacking.

13/ Moreover, construing sections 1252 and 1253 in tandem is consistent with the Court's practice of treating all its direct appeal statutes in the same manner. See Tushnet, The Mandatory Jurisdiction of the Supreme Court - Some Recent Developments, 46 U. Cinn. L. Rev. 347, 351 (1977).

For that reason, the Court must dismiss this appeal. 14/

II. ALTERNATIVELY, THE COURT SHOULD SUMMARILY AFFIRM THE JUDGMENT BELOW

If, despite the foregoing, the Court concludes that it has jurisdiction over this appeal, it should nonetheless summarily affirm the judgment below. At this level of analysis, the Court need not consider whether the district court committed legal error or abused its discretion in approving the Consent Decree or resolving the unsettled issue in plaintiffs' favor. For, as noted in the margin, n. 14, appellants do not contend in their Jurisdictional Statement that the settlement itself is unfair, inadequate or unreasonable or that the district court erred in ordering the reinstatement and resumption of benefits to plaintiff class members whose workers' compensation payments were terminated after issuance of the February 1, 1984 liability opinion. In any event, no such contention could validly be advanced. 15/

This leaves for analysis the correctness of the district court's constitutional holding. However, based on the unchallenged findings of fact made below, and the district court's application of this Court's governing precedents, it is manifest that the questions presented by appellants are so insubstantial as to be inappropriate for review here.

14/ Even if the Court did have jurisdiction to consider an appeal of the district court's order approving the Consent Decree or that portion of its order resolving the unsettled issue in plaintiffs' favor -- and no such jurisdiction exists under section 1253 -- the appeal would still have to be dismissed for the fundamental reason that neither of those two issues has been presented for review in appellants' Jurisdictional Statement. Not having been presented, they must be deemed to have been waived.

15/ The district court applied the traditional standards of fairness, adequacy and reasonableness in assessing and ultimately approving the merits of the Consent Decree. App. at 10a - 26a, 591 F. Supp. at 1284-1290. In resolving the unsettled remedy issue, the district court applied the three-factor test for nonretroactivity enunciated by this Court in Chevron Oil Company v. Huson, 404 U.S. 97 (1971), and concluded that its remedy for these plaintiff class members should be retroactive to February 1, 1984 -- the date of its liability opinion. App. at 26a - 29a, 591 F. Supp. at 1290-1291.

A. THE DISTRICT COURT CORRECTLY FOUND THAT PLAINTIFFS-APPELLEES HAVE A STATE-CREATED PROPERTY INTEREST IN THE CONTINUED RECEIPT OF BENEFITS

At the outset, appellants assert that a due process analysis is inapplicable to this case since Pennsylvania does not consider entitlement to workers' compensation benefits to be a fundamental right. Jurisdictional Statement at 6-7. This, of course, "misconceives the nature of the issue and is refuted by prior decisions." Goss v. Lopez, 419 U.S. 565, 572 (1975). The issue is not whether plaintiffs-appellees have a fundamental right to benefits, but whether, under Pennsylvania law, they have a state-created property interest in the continued receipt of benefits which cannot be deprived without due process of law.

Property interests generally do not derive from the Constitution. Rather, they stem from some independent source such as state law, in the form of statutes or rules entitling citizens to certain benefits. Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982), Parratt v. Taylor, 451 U.S. 527, 529 n. 1 (1981), Goss v. Lopez, 419 U.S. at 572, Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Whether or not a particular state-created entitlement rises to the level of a property right is a matter of federal constitutional law. Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 9 (1978).

The underlying purpose of the Fourteenth Amendment's procedural protection of property is to "safeguard . . . the security of interests that a person has already acquired in specific benefits." Roth, supra, 408 U.S. at 576. Thus, this Court has often held that recipients of statutorily created public benefits have a property interest in the continued receipt of those benefits which may not be deprived, even on an

interim basis, without some form of due process protection. Matthews v. Eldridge, 424 U.S. 319 (1976) (social security disability benefits), Goss v. Lopez, supra (public education), Goldberg v. Kelly, 397 U.S. 254 (1970) (public assistance benefits).

In light of the foregoing, the district court had little difficulty in finding a constitutionally cognizable property interest in plaintiffs' continued receipt of workers' compensation benefits. App. at 50a - 53a, 579 F. Supp. at 224-225. In fact, the court found no distinction, for purposes of Fourteenth Amendment analysis, between the federal disability benefits at issue in Matthews, and the state disability benefits involved here.

The district court's judgment was clearly correct. Pennsylvania, by statute, has created a property interest in plaintiffs' continued receipt of workers' compensation benefits once eligibility has been established by either agreement of the parties or award by the state administrative authorities. That eligibility continues until or unless there is some subsequent agreement between the parties or award of the compensation authorities suspending or terminating eligibility. See § 413(b) of the Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, § 774.1 (Purdon Supp. 1984). Appellants have conceded as much. Jurisdictional Statement at 3. Moreover, the burden is on the employer or insurance carrier to prove, by clear and convincing evidence, that a claimant has undergone a change in status so as to entitle it to a termination of benefits. Dale Manufacturing Co. v. Bressi, 491 Pa. 493, 421 A.2d 653 (1980), Romanski v. Workmen's Compensation Appeal Board, 33 Pa. Commw.

273, 381 A.2d 508 (1978). 16/

Workers' compensation benefits, in other words, are not a privilege which can be unilaterally withdrawn at the whim of the employer. They may only be terminated "for cause." See Logan, supra, 455 U.S. at 430, Memphis Light, supra, 436 U.S. at 11. This alone is sufficient to require that workers' compensation benefits be characterized as property for purposes of the Fourteenth Amendment. Even more compelling, however, is the fact that the Pennsylvania courts have recognized workers' compensation benefits as a form of property. Congleton v. Department of Public Welfare, 48 Pa. Commw. 615, 617, n. 2, 409 A.2d 1382, 1383, n. 2 (1980) ("we find no merit in appellant's argument that a pending workmen's compensation claim is not property"), Sayre v. Textile Machine Works, 129 Pa. Super. 520, 523, 195 A. 786, 788 (1938) (". . . compensation payments . . . are intended as a substitute for wages which the employee would have earned if he had not been injured"). See also Kelmon v. Reiber, 161 Pa. Super. 169, 53 A.2d 903 (1947) and Keller v. Old Lycoming Township, 286 Pa. Super. 339, 348 n. 6, 428 A.2d 1358, 1363 n. 6 (1981). So clear is the law on this point that throughout the eight years consumed by this litigation, no defendant has ever challenged the status of workers' compensation benefits as

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16/ It should be noted that workers' compensation benefits are a statutory substitute for two well recognized property interests -- wages, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and a cause of action against the employer for work-related injuries. Keller, supra. See Logan, supra (cause of action is a species of property protected by the Fourteenth Amendment). See also Martinez v. California, 444 U.S. 277, 281-282 (1980) (state tort claim arguably a species of property protected by the Fourteenth Amendment). It is inconceivable that Pennsylvania intended to attach less significance to the benefits with which it replaced these interests, than it did to the interests themselves.

constitutionally protected property. 17/

B. THE DISTRICT COURT CORRECTLY FOUND STATE ACTION AS A RESULT OF PENNSYLVANIA'S DIRECT RESPONSIBILITY AND INVOLVEMENT IN THE AUTOMATIC SUPERSEDEAS PROCESS

After extensive fact-finding (App. at 58a - 69a, 579 F. Supp. at 227-232), the district court held that Pennsylvania was intimately and directly responsible and involved in the automatic termination of plaintiffs' workers' compensation benefits (App. at 71a, 579 F. Supp. at 233). Appellants do not and cannot challenge those findings as clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure.

Nor, contrary to appellants' hyperbolic suggestion, does the district court's holding represent a "significant and unwarranted extension" of the state action principles enunciated by this Court in Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). See Jurisdictional Statement at 20. To the contrary, the district court's holding was logically compelled by Lugar given the exclusive state-created nature of the automatic supersedeas procedure and the direct participation by Pennsylvania in the termination of plaintiffs' benefits.

17/ Appellants' alternative argument that if a property interest exists at all, it is deserving of less protection than would be the case in "life-threatening or welfare-requiring situations", Jurisdictional Statement at 7, is misplaced. Whether or not due process attaches to a particular deprivation depends not on the weight, but rather the nature of the interest at stake. Goss v. Lopez, supra, 419 U.S. at 575. If the interest is not de minimus, "its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." Id., at 576. See also Board of Regents v. Roth, supra, 408 U.S. at 570, Sniadach v. Family Finance Corp., supra, 395 U.S. at 342. Here, the district court specifically found that plaintiffs' interest in the continued receipt of workers' compensation benefits was not de minimus. App. at 51a - 53a, 579 F. Supp. at 224-225. In fact, it found further that the termination of benefits represented a significant, and frequently irreplaceable, loss of income to plaintiffs. App. at 53a, 579 F. Supp. at 225. Accord Board of Regents v. Roth, 408 U.S. at 577 ("[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined").

In accordance with Lugar, the district court conducted a dual inquiry. First, it inquired into whether the deprivation was "caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state [was] responsible." Secondly, it analyzed whether "the party charged with the deprivation [was] a person who may fairly be said to be a state actor." App. at 58a, 579 F. Supp. at 227, et seq.

1. The Automatic Supersedeas Procedure Is A State-Created Right Or Privilege

The automatic supersedeas provision of section 413(a) provided not only the right to terminate workers' compensation benefits without notice or an opportunity to be heard; it also created the exclusive procedure by which that right was to be exercised. Leaseway Systems v. Workmen's Compensation Appeal Board, 53 Pa. Commw. 520, 418 A.2d 796 (1980). The district court found that in the absence of that state-created mechanism, no defendant could have legally terminated benefits without a referee's adjudication or the consent of the claimant. App. at 60a, 579 F. Supp. at 228. See also § 413(b), 77 P.S. § 774.1 (Purdon's Supp. 1984). Appellants have conceded this point. Jurisdictional Statement at 3. There is thus no reason for this Court to review the district court's conclusion that the automatic supersedeas procedure constituted "the exercise of some right or privilege created by the state." App. at 59a, 579 F. Supp. at 228. 18/

18/ In addition to Lugar, the district court's conclusion is further supported by a consistent line of cases holding that similar state-created ex parte procedures were invalid under the Due Process Clause. See, e.g., North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601 (1975), Fuentes v. Shevin, 407 U.S. 67 (1972), Sniadach v. Family Finance Corp., supra. Implicit in each of those cases, of course, was a finding of state action. Lugar, supra, 457 U.S. at 933.

2. The District Court Correctly Found That The Invocation Of The Automatic Supersedeas Procedure By Any Carrier, Public Or Private, Was Action Properly Attributable To The State

Having concluded that the automatic supersedeas procedure satisfied the first prong of the Lugar test, the district court went on to find that the "fair attribution" prong had been satisfied as well. At the outset, there can be no question that when the alleged violator of constitutionally protected rights is either a state or local governmental entity, the state action requirement is a fortiori satisfied. See, e.g., Lugar, supra, 457 U.S. at 928 et seq., Parratt v. Taylor, supra, Flagg Brothers v. Brooks, Inc., 436 U.S. 149, 157 n. 5 (1978). The district court properly recognized that under such circumstances, where the official character of the actor "lend[s] the weight of the State to his decisions", the two prongs of the Lugar analysis collapse into one. App. at 62a, 579 F. Supp. at 229, citing Lugar, supra, 457 U.S. at 937. Thus, the district court was unquestionably correct in concluding that self-insured public employers were state actors when they invoked the automatic supersedeas against plaintiffs. App. at 61a - 62a, 579 F. Supp. at 229.

Appellants do not seriously challenge that ruling. Nor can they rationally challenge the district court's finding of state action in the context of public or private employers insured by the State Workmen's Insurance Fund (hereafter "SWIF"). App. at 62a - 64a, 579 F. Supp. at 229-230. SWIF, a state agency, is required to ensure all employers who cannot obtain workers' compensation on their own or any other employer that chooses to be insured by it. By statute, SWIF, like any other insurance carrier, is the "duly authorized agent" for every employer it insures. § 401, Pa. Stat. Ann. tit. 77, § 701, as amended,

February 8, 1972, P.L. 25, No. 12, § 3 (Purdon Supp. 1984). By subscribing to SWIF, each of these employers becomes a member of that organization, "administered by officers and employees of the State as an agency of the State." SWIF v. Pittsburgh Coal Corp., 332 Pa. 201, 206-207, 2 A.2d 704, 706 (1938). Moreover, the district court found that each of SWIF's employees and officers are "for all purposes whatsoever [ ] officers and employees of the Commonwealth of Pennsylvania." App. at 63a, 579 F. Supp. 229-230, citing Pa. Stat. Ann. tit. 77, § 381, Act of April 20, 1921, P.L. 195, § 1 (Purdon 1952). Thus, it appropriately found that "when SWIF acts, for either public or private employers, the state acts." App. at 64a, 579 F. Supp. at 230. 19/

Appellants' state action argument, therefore, principally focuses on the district court's characterization of private insurers and self-insured private employers as state actors when they invoked the automatic supersedeas provision of section 413(a). Their private character, appellants argue, insulates them from any responsibility under the Fourteenth Amendment. This Court has consistently held however, and reiterated in Lugar, "that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor'". Lugar, 457 U.S. at 941. In this context, the district court noted that joint participation with the state "[does not require] something more than invoking the aid of state officials to take advantage of state created attachment procedures." App. at 67a, 579 F. Supp. at 231, quoting Lugar, supra, 457 U.S. at 942. Accord

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19/ SWIF stipulated at trial that it insured approximately 20,000 Pennsylvania employers under section 401 of the Workmen's Compensation Act. See Class Stipulations of Fact, at ¶ 23.

Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970), United States v. Price, 383 U.S. 787, 794 (1966). See also North Georgia Finishing, Inc. v. Di-Chem, supra, Fuentes v. Shevin, supra.

As was the case in Lugar, the Commonwealth of Pennsylvania directly involved itself, its Bureau of Workers' Compensation ("the Bureau") and the Bureau's employees in the supersedeas process. It did so by creating the exclusive method by which benefits could be automatically suspended. Under state law, the failure to adhere to that proscribed method subjects insurance carriers and self-insured employers to statutory penalties. See Section 435(a), as amended by Act of Feb. 8, 1972, P.L. 25, Pa. Stat. Ann. tit. 77, § 991(d)(i) (Purdon Supp. 1984). See also § 131.34, Pa. Bull., Vol. 11, No. 45, Nov. 7, 1981. 20/

Termination under section 413(a) could only be accomplished through the "filing" with the Bureau of a form petition which it provided. App. at 67a, 578 F. Supp. at 231. See also Federal Insurance Co. v. Areias, 680 F.2d 962, 964 (3d Cir. 1982), Workmen's Compensation Appeal Board v. Leuschen, 21 Pa. Commw. 39, 342 A.2d 810 (1975). The Bureau processed and reviewed the petition to ensure that it complied with the Workmen's Compensation Act and its own rules and regulations.

20/ In addition, as a result of the 1974 amendments to the Workmen's Compensation Act, Pennsylvania has made coverage under the Act mandatory for all employers and employees in the Commonwealth. No employer or employee, whether "public" or "private", may opt out of coverage without incurring criminal liability. See section 303(a), as amended by Act of December 5, 1974, P.L. 782, Pa. Stat. Ann. tit. 77, § 481(a) (Purdon Supp. 1984).

Only if the petition passed muster under those standards, was the supersedeas allowed to take effect. In that case, it was the Bureau itself, not the insurer, which notified the worker that his or her benefits had been terminated. If, however, the Bureau determined that the petition or the accompanying documents were defective, they were rejected and returned by the Bureau to the insurer or self-insured employer with instructions for correction. 21/ Where a defect was found, the Bureau notified the petitioning party of its continuing obligation to make payments of compensation.

Moreover, the statutory scheme created by section 413(a) provided unique advantages and benefits for those insurers or self-insured employers who invoked the automatic supersedeas provision. Thus, if employers or insurers did not take an automatic supersedeas when the allegations of their termination petition made a supersdedas appropriate, they could not subsequently obtain reimbursement from the Supersedeas Fund for any alleged overpayment of benefits. Department of Labor and Industry v. Workmen's Compensation Appeal Board, 58 Pa. Commw.. 413, 427 A.2d 1277 (1981).

* * *

Based upon the cumulative impact of the preceding findings of fact, and its application of this Court's governing precedents, the district court reached the unavoidable conclusion that the Commonwealth of Pennsylvania was an essential participant in the automatic supersedeas process -- a process

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21/ Thus, the district court correctly noted that Blum v. Yaretsky is not to the contrary. There, no state action was found since the state never reviewed the challenged transfer decision in any way, and had no authority to approve or deny it. The contrary is true in Baksalary.

"legitimized" by legislation and lacking in a common law counterpart. The joint participation between and among the insurance carriers, the employers and the Commonwealth of Pennsylvania in order to effect a deprivation of workers' compensation benefits was, as the district court held, "sufficient to subject private invocation of the automatic supersedeas to the due process clause." App. at 68a - 69a, 579 F. Supp. at 232.

C. THE DISTRICT COURT CORRECTLY HELD THE AUTOMATIC SUPERSEDEAS PROCEDURE TO BE A VIOLATION OF PLAINTIFFS' RIGHTS TO DUE PROCESS OF LAW

The district court held the automatic supersedeas procedure to be constitutionally defective in two respects: first, section 413(a) provided no notice at all to plaintiffs prior to the termination of their benefits, 22/ and second, it offered them no opportunity to challenge that termination until many months after it had already taken effect. 23/ See App. at 70a - 71a, 579 F. Supp. at 232-233; see also concurring opinion of Judge Adams, App. at 73a - 81a, 579 F. Supp. at 233-237.

The district court's holding represented a mainstream decision consistent with a well-settled line of precedent from this Court. Under that precedent, "due process [ordinarily] requires an opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest." Memphis Light, Gas & Water Division v. Craft, supra, 436 U.S. at 19, citing

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22/ Notice of the termination, as pointed out supra at 21, was provided by the Bureau of Workers' Compensation, not by individual insurers or employers. Even then, the Bureau's notification was sent subsequent to the actual termination of benefits. App. at 71a, 579 F. Supp. at 233.

23/ Frequently, as found by the district court, benefits were terminated for more than a year prior to a referee's decision on the merits. App. at 52a, 579 F. Supp. at 224.

Boddie v. Connecticut, 401 U.S. 371, 379 (1971). See also Logan v. Zimmerman Brush Co., supra, 455 U.S. at 437, Parratt v. Taylor, supra, 451 U.S. at 540 (1981). Likewise, notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" is constitutionally required prior to deprivation of a protected property interest. Memphis Light, Gas & Water Co., supra, 436 U.S. at 13. See also Fuentes v. Shevin, supra, 407 U.S. at 80, Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313-314 (1950). 24/

The Court has applied these principles to invalidate on due process grounds a host of state laws that failed to provide any notice or opportunity to be heard before the deprivation occurred. See, e.g., Goldberg v. Kelly (public assistance), Sniadach v. Family Finance Corp. (wages), Bell v. Burson, 402 U.S. 535 (1971) (driver's license), Fuentes v. Shevin (personal property), Memphis Light, Gas & Water Division v. Craft (utilities), Connell v. Higginbotham, 403 U.S. 207 (1971) (public employment) and Goss v. Lopez (public education). These cases, and the due process principles enunciated in them, apply to interim deprivations of property as well as final deprivations. See, e.g., Arizona v. California, 460 U.S. 605, 638 n. 28, (1983), Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980), Sniadach v. Family Finance Corp., supra, 395 U.S. at 340 et seq., Fuentes v. Shevin, supra, 407 U.S. at 84-85.

24/ A departure from these principles of prior notice and hearing has only been justified in "extraordinary situations." Boddie v. Connecticut, supra, 401 U.S. at 379. These situations have been limited to cases involving public health emergencies, North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908), bank failures, Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928) and considerations brought on by war. Bowles v. Willingham, 321 U.S. 503 (1944).

This case, of course, does not involve any such exigency. Nor have appellants contended otherwise.

The question in this case is not, as appellants mistakenly suggest, the nature of the process that is due, for the issue here is far more fundamental: the automatic supersedeas procedure at issue here is unconstitutional on its face, as held by the district court, since it provides no process or notice of any kind. Not being a form of process case like Matthews v. Eldridge, appellants' reliance on the balancing of interests test enunciated there is obviously misplaced.

Similarly misplaced is appellants' claim that due process only applies to "life-threatening or welfare-requiring situations." Jurisdictional Statement at 7. That argument again misconceives the constitutional distinction between the nature of the process that is due in a particular case or whether process is due at all. Goss v. Lopez, supra, 419 U.S. at 575. It is now well-settled that due process applies to not just the "necessities of life" but requires instead "an opportunity for [some kind of] hearing before a deprivation of [any] property takes effect." Fuentes v. Shevin, supra, 407 U.S. at 88. See also id. at 89: "While Sniadach and Goldberg emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine."

To assert, as appellants do, that due process is satisfied by requiring a worker to submit to a medical examination by one of their own doctors is to ignore the most "elementary and fundamental requirements of due process." Memphis Light, Gas & Water Co., supra, 436 U.S. at 13. For, as the Court has repeatedly held, one of the critical elements of any due process proceeding is that a person whose rights are to be affected is entitled to be heard by an impartial decision-maker. See, e.g., Schweiker v. McClure, 456 U.S. 188 (1982), Marshall v. Jerrico, Inc., 446 U.S. 238 (1980).

It is clear, then, that the doctor's visit relied upon by appellants has no constitutional significance. The claimant is notified to appear for a medical examination, not a proceeding to defend his or her continued right to receive worker's compensation benefits. At the time of the visit, there is no proceeding to terminate benefits pending against the worker, thus it is inappropriate to suggest that he or she should come to the examination prepared to defend against a possible termination petition which may or may not be filed some time in the future. Furthermore, the doctor is not the decision-maker in charge of determining whether a termination petition will be filed, and whether an automatic supersedeas will be sought. In addition, the doctor's association with the insurance company undermines the fundamental necessity of impartiality. As Judge Adams so aptly observed in his concurrence: "the use of the unchecked recommendation of a physician in the employ of an interested party to terminate a benefit in which a recipient has a cognizable property interest is at odds with the due process concepts set forth in Matthews and Goldberg." App. at 81a, 579 F. Supp. at 237. Such a process is not conducive to determining the validity, or at least the probable validity of the underlying claim. Fuentes v. Shevin, supra, 407 U.S. at 83, Sniadach v. Family Finance Corp., supra, 395 U.S. at 343 (Harlan, J., concurring), and thus is unconstitutional.

Finally, appellants have misrepresented to the Court both the nature of the district court's holding of unconstitutionality as it applies to plaintiffs who have returned to work as well as the Consent Decree's disposition of those cases. In neither context did the district court or the parties contemplate that an individual who returned to work with no loss of earnings would simultaneously be entitled to receive both the

payment of compensation and salary. A statement to that effect was submitted to the lower court and its approval of the Consent Decree was specifically predicated on that statement. App. at 18a - 20a, 591 F. Supp. at 1287-1288.

Moreover, with respect to the district court's liability opinion, return-to-work claimants were properly included within the scope of its constitutional holding. First, none of these plaintiffs received any prior notice of the termination of his or her benefits. Second, section 413(a)'s automatic supersedeas procedure made no distinction between plaintiffs who returned to work permanently and those who were forced to leave their jobs again due to their work-related injury. In the latter situation, all benefits remained terminated, no matter how brief the return to work, pending a referee's decision on the merits of the underlying termination petition. Third and last, in all return-to-work cases where an automatic supersedeas was invoked, the payment of medical expenses incurred as a result of the work-related injury were terminated. These deficiencies led the district court, quite properly, to invalidate in toto the automatic supersedeas procedure of section 413(a).

CONCLUSION

For the reasons stated, named and class appellees respectfully move the Court to either dismiss the appeal for want of jurisdiction or, in the alternative, to summarily affirm the constitutional adjudication of the three-judge district court.

Respectfully submitted,

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No. 84-768 (4)

IN THE

Supreme Court of the United States

October Term, 1984

ALLSTATE INS. COMPANY, ARGONAUT INS. COMPANY, HARLEYSVILLE INS. COMPANY, OHIO CASUALTY GROUP OF INS. COMPANIES, ROYAL INS. COMPANY, SUN COMPANY, INC., TRAVELERS INS. COMPANY and WAUSAU INS. COMPANIES,

Appellants/Objecting Members of Defendant Class,

vs.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, CHARLES SAMUEL, Individually and on behalf of all others similarly situated,

Appellees/Plaintiffs,

and

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS ASSOC. INS. COMPANY, AMERICAN MUTUAL LIABILITY INS. COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORP. and all other insurance carriers and/or self-insured employers similarly situated,

Defendants (Appellees).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

ARGUMENT

Absent members of a defendant class, against whom a final order of a three judge district court imposes individual injunctive relief, having appeared and objected upon notification of the fairness hearing on a consent decree proposed by named parties after constitutional determination on the merits by the Court, are parties entitled to maintain a direct appeal of such constitutional determination to the United States Supreme Court pursuant to 28 U.S.C. §1253.

This is a dual class action insisted upon by plaintiffs and imposed upon defendants under Fed. R. Civ. Pro. 23(b)(2). Plaintiff-employees sought and obtained individual declaratory and injunctive relief against each and every one of some nine hundred insurance companies and self-insured employer members of defendant class, proscribing the use of a supersedeas procedure set forth in §413(a) of the Pennsylvania Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1984), with liability for apportioned share of plaintiffs' attorney's fee.

Having secured this result, after urging that there was a violation of procedural due process under the Fourteenth Amendment to the United States Constitution by reason of an interim suspension of workmen's compensation benefits without prior notice and opportunity to be heard, plaintiffs-appellees now vigorously maintain that the appellants, as absent defendant class members who were not furnished formal notice of the proceedings, prior to the scheduling of the fairness hearing, shall have no opportunity themselves to be heard on the constitutional issue resolved against them.

Appellants did appear, object and argue at the fairness hearing on the proposed consent decree entered into by the named parties after the decision by the lower court. In addition appellants did specifically note preservation of the right to object to the entire constitutional determination. (Apdx. 136a, 138a, 144a, 147a). Following the court's final order, granting both declaratory and injunctive relief against each defendant class member, appellants initially filed a protective appeal to the Court of Appeals for the Third Circuit (Apdx. 84a), and then a direct appeal to this Court (Apdx. 87a), both within the required time.

As parties aggrieved by a final order of a three judge court granting injunctive relief, appellants have an evident statutory right to direct appeal to this Court under 28 U.S.C. §1253. There is no law or logic to the contrary. The cases cited by appellees are inapposite, nor do they suggest any rational theory that would recommend the position they advance.

In *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), the district court *denied* a motion to enter a consent decree proposed by plaintiff class and the named defendants. Plaintiffs appealed to the circuit court where the appeal was dismissed for want of jurisdiction. This Court granted certiorari and held that the district court's refusal to approve the consent decree had the practical effect of refusing an injunction, which, with the additional determination of irreparable consequences, constituted an exception to the "final judgment rule," permitting appeal that should have been entertained by the circuit court under 28 U.S.C. §1292(a)(1). *Id.* at 84-85.

The further language quoted in *Carson*, at 86, from *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971),

relied upon by appellees, does not apply in context here. In *Armour*, it was stated:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. . . . Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

Id. at 681-682. Such comment by the Court not only fails to support appellees' contention, but indeed lends inferential weight to, if not specific authority for, appellants' position as *objecting* members of defendant class, with regard to the processing of the instant appeal, since they did *not* negotiate, agree, consent or "waive their right to litigate."

In *Armour*, the government was seeking to include a subsequently-acquired company within the prohibitory terms of the previous consent decree. This Court found such effort to be unsupported by the precise terms of the consent decree, and it was in such context that the quoted statement was made about decrees entered by agreement having constituted a waiver of the consenting parties' right to litigate the issues. In fact, then, *Armour* does not contradict appellants' right, as objecting members of the defendant class, to litigate the issues resolved against them.

While opinions typified by *Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956 (3d Cir. 1983), may fairly be said to support a general, if not axiomatic, proposition that courts favor settlement of complex litigation, the merit of such consummation rather obviously was not compelling here. Similarly, the appellees' basic assertion that "[t]he very reason why litigants enter into settlements, by Consent Decree or otherwise, is to avoid a judicial determination of the merits of the underlying controversy," *Motion to Dismiss* at 10, is singularly inappropriate and strikingly inapplicable. This case was *not* "settled"; instead, it was litigated for eight years, following which the court—not the parties—made that very "judicial determination of the merits of the underlying controversy." *Id.*

In a fifty page majority and concurring opinion, the lower court decided that the interim suspension procedure in §413(a) of the Pennsylvania Workmen's Compensation Act violates the due process clause of the Fourteenth Amendment to the United States Constitution. It was the declaratory and injunctive implementation of that constitutional determination against defendant class members that was then agreed to by the named parties. Comments in cases reviewing, not a judgment, but rather the propriety of a monetary settlement to a plaintiff class are not controlling and are hardly relevant here. *Accord, Airline Stewards & Stewardesses Ass'n v. Trans World Airlines, Inc.*, 630 F.2d 1164 (7th Cir. 1980), *rev'd sub nom. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982), where this Court rejected a supposed jurisdictional prerequisite, and actually *reversed* the circuit court decision which had denied an intervenor's appeal after a class action settlement providing monetary and seniority relief. The

earlier comment by the circuit court about the "virtue which may reside in a compromise" had been made in the context of "avoidance of wasteful litigation and expense" by effecting a settlement in lieu of pursuing a decision on the merits. 630 F.2d at 1167. Here, however, after eight years of litigation, a decision on the merits *was* rendered by the lower court. In any event, in *Zipes* this Court did in fact entertain the appeal to the extent of ruling on the jurisdictional question. Thus if the case has any application here it is supportive of, and not contra to, the instant appeal.

In those cases where the "fair, reasonable, and adequate" standard for a consent decree is stated, it was in fact the fairness, reasonableness, and/or adequacy of the consent decree that had been put in issue, but none of the cases cited and/or relied upon by appellees actually support their contention that these appellants are precluded from raising on appeal the merits of the underlying controversy. Significantly, in *Armstrong v. Board of School Directors*, 616 F.2d 305 (7th Cir. 1980), though cited by appellees, is found an authoritative statement on the very issue they raise, specifically supporting the appeal filed by these appellants:

> An unnamed class member who appears in response to a Rule 23(e) notice and objects to a settlement has a right to appeal from an adverse judgment.

Id. at 327. So too said the court in *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059, 1060 (7th Cir. 1970); *see also* 3B Moore's Federal Practice ¶23:80[5] (1982 and Supp. 1984).

In the case at bar, it was only at the time of the scheduled fairness hearing on the consent decree to implement the court's decision on the merits that Rule 23(e) notice of the proceedings was finally given to non-named class members, with instructions as to method and means of objection. Appellants duly appeared, objected and argued, noting their intent to preserve their right to question the entire constitutional determination. It seems anomalous, if not incredible, in a case predicated upon a supposed deprivation of due process to an *employee* class complaining about absence of prior notice and opportunity to be heard, for those employees to argue now that non-named members of *employer* class, though they objected at first notice of the proceedings, nevertheless shall have no opportunity to be heard on the merits of a final constitutional determination that visits both declaratory and injunctive prohibition upon each one of them.

Such could hardly be a reasonable or required result. Surely objecting employers and insurance carriers, as members of the designated defendant class, must be due and afforded "process" that includes a meaningful opportunity to be heard on the merits by timely appeal. That seems implicit in this Court's decision in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), where a *putative* member of a class that had been *denied* designation was permitted to intervene for purposes of appealing that issue, following an agreed-upon award.

Appellees concede that appeal by these appellants did lie on "whether the district court abused its discretion, or misapplied governing legal precepts, in approving the Consent Decree." *Motion* at 9. If so, then some form of appellate review was to be had, and there would be no logic whatever to suggest that in the case at bar, review should vacuously consider only some element of fairness

of the remedy. This is not a case involving one issue on the merits and a separate issue on damages, where parties might accept an adverse result, but seek to question some compromised award for or against them. Here, the declaratory and injunctive relief proscribing the use of the supersedeas procedure actually flows as a direct continuation of and from the determination of unconstitutional conduct. To question fairness of the remedy would, by indirection, necessarily put in question the constitutional basis for relief, and that is exactly what these appellants seek to do directly in this appeal.

Moreover, any multiplicity of litigation that class actions are thought or intended to avoid should be recognized as horizontal in nature, to preclude collateral duplication. But most assuredly and particularly class action "theory" should support, if not insist upon, vertical completion of the litigation, to include thorough and unrestricted appellate review by class members affected adversely by the class determination. Opportunity for such inclusive appellate review within the required time does not prolong the litigation in chief beyond what would be required if a named party were to appeal, and serves to assure the basic and essential due process fairness to be accorded to all class members—named and absent—before any class result is imposed inexorably upon each and all of them.

There is no case law cited that precludes these appellants from review of the lower court's constitutional determination on the merits. All relevant statements, comments and inferences, together with the weight of common sense, logic and, indeed, due process itself, urge, if they do not dictate, to the contrary. Appellants therefore pray this Honorable Court to permit the pending appeal on substantial constitutional issues to proceed.

Conclusion

For the reasons stated, this Court should note probable jurisdiction, deny appellees' Motion to Dismiss or Affirm, and permit the instant appeal to be heard on the constitutional merits.

Respectfully submitted,

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